THE INDIAN LAW REPORTS

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... ... J. V. WOODMAN, *Middle Tem*

High Court, Allahabad ... ... W. K. PORTER, *Gray's Inn*

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JUDGES OF THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES.

1908.

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ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 28, 231—*Counterfeiting coin—Definition—Intention.*] In order to constitute the offence defined by section 231 of the Indian Penal Code, it is not necessary that the counterfeit coin should be made with the primary intention of its being passed as genuine: it is sufficient if the resemblance to genuine coin is so close that it is capable of being passed as such.

Emperor *v.* Kadir Bakhsh, I. L. R., 30 All. 93

——— SECTIONS 182, 211—*Criminal Procedure Code, section* 195—*Information given to the police alleged to be false—Procedure—Notice.*] Where a District Magistrate, upon a report made by the police that information given to them charging a person with a specific crime is false, orders the person giving such information to be prosecuted under section 211 of the Indian Penal Code, such order is not an order to which section 195(*b*) of the Code of Criminal Procedure applies, neither is the order passed without jurisdiction if no previous notice to show cause is given to the accused. The more proper course, however, would be to let the informant bring his witnesses into Court, hear them out, and then, if the case was considered to be a false case, to pass an order that the informant should be tried under section 211 of the Indian Penal Code. *Queen-Empress* v. *Ganga Ram*, I. L. R., 8 All., 38, *Emperor* v. *Tula*, I. L. R., 29 All., 587 and *Haibat Khan* v. *King Emperor*, I. L. R., 33 Calc., 31, distinguished.

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——— SECTIONS 302, 304, 325, 328 AND 329—*Administration of dhatura for the purpose of facilitating robbery—Death of person to whom dhatura is so administered—Offence not murder, but causing grievous hurt.*] Where, for the purpose of facilitating robbery, dhatura was administered by two persons to certain travellers, in consequence of which one of the travellers died and others were made seriously ill, it was *held* that in respect of the traveller who died the offence committed was that punishable under section 325 of the Indian Penal Code, *viz.*, grievous hurt: and in respect of the travellers who did not die the offence committed was that defined by section 328 of the Code. *Queen-Empress* v. *Tulsha*, I. L. R., 20 All., 143, not followed.

Emperor *v.* Bhagwan Din, I. L. R., 30 All. 568

——— 1867 — III (GAMBLING ACT), SECTIONS 5 AND 6—*Warrant for search of suspected house—"Credible information"—Procedure—Endorsement of warrant by officer to whom it was issued.*] Warrants issued under Act No. III of 1867 are governed by those provisions of the Code of Criminal Procedure which provide for the issue and

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execution of warrants in general: there is, therefore, no objection to the officer to whom such a warrant is originally issued endorsing it to another officer, provided that the latter is an officer to whom such warrant could be legally issued in the first instance.

Emperor *v.* Kashinath, I. L. R., 30 All. 60

ACTS—1870—VII (COURT FEES ACT), SECTION 7, IX; SCHEDULE I, ARTICLE 1—*Court fee—Decree for redemption of mortgage—Appeal on the main ground that nothing was due under the mortgage.*] *Held* that in the case of an appeal from a decree allowing a defendant mortgagor to redeem the mortgage on payment of a sum named therein based upon the ground that the mortgage debt has been satisfied out of the usufruct of the property mortgaged and nothing whatever is due from him the proper court fee payable is an *ad valorem* fee upon the total amount of the decree under appeal. *Nepal Rai* v. *Debi Prasad*, I. L. R., 27 All., 447, and *Reference under Court Fees Act*, 1870, I. L. R., 29 Mad., 367, followed.

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——————————— SECTION 30—*Confession—Joint trial—Plea of guilty by one of the accused—Use of his confession against the rest—Criminal Procedure Code, sections* 271, 342.] Where an accused person has pleaded guilty and the Court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence with other co-accused and any statement in the nature of a confession that he may make used against them. *Queen-Empress* v. *Paltua*, I. L. R., 23 All., 53, followed.

Emperor *v.* Kheoraj, I. L. R., 30 All. 540

——————————, SECTION 32, CLAUSE (5) —*Evidence—Pedigree—Proof of pedigree—Knowledge of names of ancestors from hearing them recited on ceremonial occasions—Pedigree made post litem motam—Controversy in different matter from that which if after suit would render statement inadmissible—Document made on particular occasion for specific purpose treated as declaration—Proof of heirship—Act No. I of* 1872 *(Indian Evidence Act), section* 32, *clause* (2).] The plaintiffs sued to recover immovable property as next heirs, through their father, of one Gur Sahai. The principal defendant was the sister's son of Gur Sahai. On the plaintiffs' oral evidence and on certain pedigrees produced by them the Subordinate Judge was of opinion that Gur Sahai and the plaintiffs' father were descended from one common ancestor, from whom they were only seven degrees removed, and that their claim was proved. The defendant produced a pedigree which showed that Gur Sahai was descended from another ancestor than that stated in the plaintiffs' pedigree and was in the 15th degree from a common ancestor, and the plaintiffs' father in the 16th degree, and he contended that under Hindu law heirship did not extend beyond the 14th degree, and that therefore he, though only a sister's son, was to be preferred to such remote relations as heir. The judgment of the Court of the Judicial Commissioner on appeal, after a lengthy and adverse criticism of the plaintiffs' evidence concluded as follows: "The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that accepting the pedigree filed by the appellant" (defendant)

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the plaintiffs are heirs of Gur Sahai, as according to it they are Samanodakas and therefore in the absence of other nearer heirs exclude the defandant, who is the son of Gur Sahai's sister."

Held that the above paragraph did not under the circumstances and for the reasons stated by their Lordships of the Judicial Committee preclude the plaintiffs from endeavouring to sustain, on this appeal, the finding of the Subordinate Judge in their favour.

Held also that the pedigrees put in by the plaintiffs were not ancient family records handed down from generation to generation and added to as a member of the family died or was born ; but documents drawn up on particular occasions for a specific purpose by members of the family, and were accordingly to be treated as mere declarations made by the persons who respectively drew them up or adopted them.

One of the pedigrees dated in 1892 was held by the Court of the Judicial Commissioner to be inadmissible in evidence as having been made *post litem motam*, although the controversy which originated in 1891 did not relate to the heirship to Gur Sahai but referred to an entirely different matter.

Held it was wrongly rejected as evidence. To make a statement inadmissible on the ground that it was made *post litem motam* the same thing must be in controversy before and after the statement is made.

Freeman v. *Phillips*, 4 M. & S., 486, *In re Shrewsbury Peerage*, 7 H. L. C., 1, and *Duke of Devonshire* v. *Neill*, 2 Ir. L. R., 132, followed.

The pedigree was admissible as a declaration made by a deceased member of a family touching the family reputation on the subject of its descent.

A pedigree, also rejected by the Judicial Commissioner's Court as inadmissible, was one signed by a deceased member of the plaintiffs' family, in the handwriting of such deceased member's son, and was stated to have been obtained from his father as a statement of the family descent for the purpose of being given in evidence in certain criminal proceedings.

Held that it had been adopted by such deceased member of the family, and not being shown to be *post litem motam* it was admissible in evidence.

Kalka Prasad *v.* Mathura Prasad, I. L. R., 30 All. ... 510

ACTS—1872—1 (INDIAN EVIDENCE ACT), SECTION 115—*Estoppel—Adoption—Suit by adoptive mother to set aside an adoption made by her.*] In a suit to set aside an adoption brought by the adoptive mother against her adopted son it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant ; that the ceremony of adoption was carried out on the faith of this representation ; that the marriage of the defendant was likewise on the strength of it celebrated, and the defendant performed the *sradh* ceremony of his adoptive father. It was further found that the defendant had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father, and that for this purpose he had incurred heavy liabilities. *Held* that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void. *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwer*, N.-W. P., H. C. Rep., 1868, p. 103A, distinguished *Sarat Chunder Dey* v. *Gopal Chunder Laha*, I. L. R., 20 Calc., 296, *Sukhbasi Lal* v. *Guman Singh*, I. L. R., 2 All., 366, *Durga* v. *Khushalo*, Weekly Notes, 1882, p 97, *Kannammal* v. *Virasami*, I. L. R., 15 Mad., 480, *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai*, I. L. R., 11 Bom., 381, and *Santappa* v. *Rangappaya*, I. L. R., 18 Mad., 397, referred to.

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ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 11, *See* Hindu law 63

——— SECTION 23, *See* Act No. XVI of 1882, sections 8 and 28 38

——— SECTION 25—*Act No. XV of 1877 (Indian Limitation Act), section 19—Acknowledgment—Promise to pay a time-barred debt.*] Where it is sought to recover a time-barred debt on the strength of a subsequent promise to pay made in writing by the debtor, the document relied on must contain an express promise to pay. A promise to pay cannot be inferred from a mere acknowledgment of the debt. *Maniram Seth* v. *Seth Rupchand*, I. L. R., 33 Calc., 1047, distinguished.

Gobind Das *v.* Sarju Das, I. L. R., 30 All. 268

——— SECTIONS 69 AND 70—"*Person interested in the payment of money*"—*Volunteer—Civil Procedure Code, section* 283.] The plaintiffs, alleging themselves to be the purchasers of the mortgagees' rights in certain land, paid the amount of a decree against the mortgagee in order to save the property from sale. But it had been already found in a suit under section 283 of the Code of Civil Procedure, that the sale to the plaintiffs was fictitious and inoperative. *Held* that the plaintiffs were not entitled to recover the amount paid as above described from their vendors. *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*, L. R., 2 I. A., 131 and *Chedi Lal* v. *Bhagwan Das*, I. L. R., 11 All., 234, referred to.

Janki Prasad Singh *v.* Baldeo Prasad, I. L. R., 30 All. ... 167

——— SECTION 178—*Pawnor and pawnee—Pawnor not owner but having a right to possession—Suit by owner for declaration of his title.*] A person who had obtained possession of certain movable property belonging to a minor in the capacity of a trustee, and who had been allowed to retain possession of such property after the minor came of age, pawned some of it to persons who were found to have acted, negligently perhaps, but honestly and in good faith. *Held* that the pledge was valid, but the owner was entitled to a declaration of his right to redeem the articles so pawned.

Sundar Deo *v.* Bhagwan Das, I. L. R., 30 All. ... 165

——— 1877—I (SPECIFIC RELIEF ACT), SECTION 9 - *Criminal Procedure Code, section* 145—*Possessory suit—Effect of order of a Criminal Court—Revision.*] *Held* that the existence of an order passed under section 145 of the Code of Criminal Procedure is no bar to the institution of a suit under section 9 of the Specific Relief Act, 1877, for recovery of possession of the same land.

Held also that when a suit under section 9 of the Specific Relief Act is decreed the remedy of the defendant lies not in revision but in the institution of a suit for a declaration of the defendant's title and for possession. *Sheo Prasad Singh* v. *Kastura Kuar*, I. L. R., 10 All., 119, referred to.

Jwala *v.* Ganga Prasad, I. L. R., 30 All. 331

——— III (INDIAN REGISTRATION ACT), SECTION 50—*Mortgage—Sale of property comprised in an unregistered mortgage—Liability of purchaser—Notice.*] Property was purchased which was the subject of an unregistered mortgage, the registration of which was not compulsory. The purchaser had no notice of the mortgage at the time of execution of the sale-deed in his favour, but received notice before the sale-deed was registered. *Held* that

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the mortgage was binding on the purchaser. The principle of *Diwan Singh* v. *Jadho Singh*, I. L. R., 19 All., 145, and *Bhikhi Rai* v. *Udit Narain Singh*, I. L. R., 25 All., 366, applied.

Khiali Ram *v.* Himmata, I. L. R., 30 All. 238

ACTS—1877—XV (INDIAN LIMITATION ACT), SECTION 19—*Limitation—Acknowledgment of debt—Guardian and minor—Capacity of natural guardian to acknowledge a debt on behalf of his ward.*] *Held* by BANERJI and RICHARDS, J.J. (STANLEY, C. J., *dissentiente*) that when a guardian acting within the scope of his authority and for the benefit of a minor makes an acknowledgment of a debt, such acknowledgment is by an agent duly authorized in this behalf and gives a fresh start for the computation of limitation. *Tilak Singh* v. *Chhutta Singh*, I. L. R., 26 All., 598, dissented from. *Chinnaya Nayudu* v. *Gurunatham Chetti*, I. L. R., 5 Mad., 169, *Sobhanadri Appa Rau* v. *Sriramulu*, I. L. R., 17 Mad., 221, *Kailasa Padiachi* v. *Ponnukannu Achi*, I. L. R., 18 Mad., 456, *Subramania Ayyar* v. *Arumuga Chetty*, I. L. R., 26 Mad., 330, *Annapagauda Tammangauda* v. *Sangadigyapa*, I. L. R., 26 Bom., 221, *Narendra Nath Sarkar* v. *Rai Charan Haldar*, I. L. R., 29 Calc., 647, *Beti Maharani* v. *The Collector of Etawah*, I. L. R., 17 All., 198, *Kamla Kuar* v. *Har Sahai*, Weekly Notes, 1888, p. 187, and *Chinnery* v. *Evans*, 11 H. L. C., 115, referred to.

Per STANLEY, C. J., The relation of guardian and ward resembles rather that of trustee and *cestui que trust* than that of principal and agent. A guardian cannot be considered the authorized agent of his ward for the purpose of making an acknowledgment of a debt on behalf of his ward within the meaning of section 19 of the Indian Limitation Act. *Matthew* v. *Brise*, 14 Beav., 341, *Markwick* v. *Hardingham*, 15 Ch. D., 349, *Beti Maharani* v. *The Collector of Etawah*, I. L. R., 17 All., 198, and *Chinnery* v. *Evans* 11 H. L. C., 115, referred to.

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SCHEDULE II, ARTICLE 75.

Limitation — Bond — Instalments—Power to sue for whole amount on default of payment.] A bond payable by instalments contained a provision that in default of the payment of any one instalment it would be in the power of the creditor to sue for the whole amount due under the bond without waiting for the period provided for the payment of other instalments. *Held* that this provision did not mean that the creditor should be compelled to sue for the whole on default of payment of one instalment nor did limitation in respect of the whole debt commence to run from the date of the first default. *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty*, I. L. R., 31 Calc., 297, and *Hurri Pershad Chowdhry* v. *Nasib Singh*, I. L. R., 21 Calc., 542, dissented from. *Shankar Prasad* v. *Jalpa Prasad*, I. L. R., 16 All., 371, and *Maharaja of Benares* v. *Nand Ram*, I. L. R., 29 All., 431, referred to.

Ajudhia *v.* Kunjal, I. L. R., 30 All. 123

SCHEDULE II, ARTICLE 91

—Limitation—Suit for cancellation of a deed—Suit for a declaration that the transaction evidenced by the deed was fictitious.] A suit for a declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed. The former kind of suit does not fall within the purview of article 91 of the second schedule to the Indian Limitation Act. *Sham Lall Mitra*

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v. *Amarendro Nath Bose*, I. L. R., 23 Calc., 460, and *Pethermal Chetty* v. *Muniandy Servay*, 12 C. W. N., 562, referred to.

Jagardeo Singh *v.* Phuljhari, I. L. R., 30 All. 375

ACTS—1877—XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLE 105, *See* Civil Procedure Code, section 43 225

——— SCHEDULE II, ARTICLE 106, *See* Civil Procedure Code, sections 43, 373 279

——— SCHEDULE II, ARTICLES 111 AND 132—*Limitation—Act No. IV of* 1882, *section* 55 (4) (*b*).—*Suit by vendor to enforce charge for unpaid balance of purchase money.*] *Held* that a suit for the enforcement of the payment of purchase money by sale of the purchased property is a suit to enforce a statutory charge differing from the lien which an unpaid vendor in equity possesses for the recovery of the balance of his purchase money, and that the article of the Limitation Act applicable is article 132 and not article 111. *Webb* v. *Macpherson*, I. L. R., 31 Calc., 57, *Har Lal* v. *Muhamdi*, I. L. R., 21 All., 454, and *Ram Krishna Ayyar* v. *Subrahmania Ayyen*, I. L. R., 29 Mad., 305, followed. *Baldeo Prasad* v. *Jit Singh*, Weekly Notes, 1891, p. 130, overruled.

Munir-un-nissa *v.* Akbar Khan, I. L. R., 30 All. ... 172

———, SCHEDULE II, ARTICLE 116—*Limitation—mortgage—Suit for compensation for the breach of a contract in writing registered.*] A registered mortgage bond provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession; further, that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the mortgagee would have power to realise the amount secured by the bond with the interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged.

Held that a suit based upon the foregoing covenant to recover the mortgage money upon failure of the mortgagor to pay instalments was in substance a suit for compensation for breach of contract, to which the limitation prescribed by article 116 of the second schedule to the Indian Limitation Act, 1877, applied. *Husain Ali Khan* v. *Hafiz Ali Khan*, I. L. R., 3 All., 600, referred to.

Collector of Mirzapur *v.* Dawan Singh, I. L. R., 30 All. ... 400

——— SCHEDULE II, ARTICLE 116—*Limitation—Sale—Suit for compensation for the breach of a contract in writing registered.*] A deed of sale of immovable property, duly registered contained a covenant to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages. The purchaser, failing to get possession of part of the property purchased sued for possession, or in the alternative for a refund of a proportionate part of the consideration money and damages. *Held* that as regards the latter relief the suit was governed by article 116, and not by article 97 of the second schedule to the Indian Limitation Act, 1877.

Mul Kunwar *v.* Chattar Singh, I. L. R., 30 All. ... 402

——— ARTICLE 116, *See* Act No. IV of 1882, section 90 383

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ACTS—1877—XV (INDIAN LIMITATION ACT), SCHEDULE II ARTICLE 178, *See* Civil Procedure Code, section 318 390

——— ARTICLE 179—*Execution of decree—Limitation—Appeal—Appeal not pressed—Terminus a quo.*] Where there has been an appeal from a decree limitation does not the less begin to run from the date of the final decree in appeal because the appeal may have been dismissed upon the representation of the appellant's counsel that he was unable to support it. *Jeeyangar* v. *Lakshmi Dass*, 16 M. L. J., 393, followed. *Hingan Khan* v. *Ganga Parshad*, I. L. R., 1 All., 293, and *Fazal Husen* v. *Raj Bahadur*, I. L. R., 20 All., 124, distinguished.

Fazl-ur-Rahman *v.* Shah Muhammad Khan, I. L. R., 30 All. 385

——— SCHEDULE II, ARTICLE 179 (4) — *Execution of decree — Limitation—Application to take some step in aid of execution—Payment of process fees.*] *Held* that the mere payment of process fees on an application for execution, unaccompanied by any application asking the Court to take some specific action, will not have the effect of giving a fresh starting-point for limitation within the meaning of article 179 (4) of the second schedule to the Indian Limitation Act, 1877. *Thakur Ram* v. *Katwaru Ram*, I. L. R., 22 All., 358, followed. *Vijiyaraghavalu Naidu* v. *Srinivasalu Naidu*, I. L. R., 28 Mad., 399, distinguished.

Sheo Prasad *v.* Indar Bahadur Singh, I. L. R., 30 All. ... 179

——— SCHEDULE II, ARTICLE 179 (5), *See* Civil Procedure Code, section 248 536

——— 1879—XVIII (LEGAL PRACTITIONERS ACT), SECTION 9, *See* Criminal Procedure Code, section 4 *(r)* 66

——— 1882—IV—(TRANSFER OF PROPERTY ACT), SECTION 41—*Application for a personal decree against mortgagor—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 116.*]

Held that the fact that there is no express personal covenant to pay the mortgage money is no bar to the mortgagee obtaining a personal decree under section 90 of the Transfer of Property Act, 1882, against the mortgagor if the requirements of the section are otherwise fulfilled: a personal covenant to pay is implied in and is an essential part of every simple mortgage. *Sawaba Khandapa* v. *Abaji Jotirav*, I. L. R., 11 Bom., 475, not followed. *Unichaman* v. *Ahmed Kutti Kayi*, I. L. R., 21 Mad., 242, referred to.

Held also that on an appplication under section 90 of the Transfer of Property Act it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. *Hamid-ud-din* v. *Kedar Nath*, I. L. R., 20 All., 386, followed.

Jangi Singh *v.* Chandar Mol, I. L. R., 30 All. ... 388

——— SECTION 43, *See* Act No. XVI of 1882, sections 8 and 28 38

——— SECTION 44, *See* Act No. IV of 1893, section 4 324

——— SECTION 52, *See* Hindu law 95

——— SECTION 52, *See* Pre-emption 467

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ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 53—*Mortgage—Assignment of invalid mortgage—Right of assignee as against mortgagor and subsequent mortgagee for consideration—Maxim—Qui prior est tempore potior est jure.*] On the 23rd of October 1897 one M.A. executed a mortgage of certain property in favour of H. A., which was registered on the 29th of October 1897. This mortgage was found to be fictitious and without consideration and to have been made solely for the purpose of defeating the creditors of the mortgagor. On the 15th of August 1898 the mortgagee transferred his rights under this mortgage to his wife B. in part satisfaction of her dower debt. It was found that this was a *bonâ fide* transaction and that B. obtained the transfer of the mortgage without any knowledge of its fraudulent character and was a transferee in good faith and for consideration. On the 29th of October 1897 the same property was again mortgaged to one B.P., who accepted the mortgage in ignorance of the existence of the mortgage of the 23rd of October 1897. This mortgage was registered on the 22nd of March 1898. B. P. afterwards brought a suit for sale on his mortgage impleading B. as a defendant, as well as the mortgagor and the prior mortgagee.

Held that B. was entitled to no relief as against B. P., though as against the mortgagor she was entitled to be paid the amount of the consideration named in the deed of transfer in her favour out of the surplus sale proceeds (if any) of the mortgaged property. *Halifax Joint Stock Banking Company* v. *Gledhill*, 1 Ch. D., 31, distinguished. *Cockell* v. *Taylor*, 15 Beav., 103, *Ogilvie* v. *Jeaffreson*, 2 Giff., 353, *Parker* v. *Clarke*, 30 Beav., 54, *French* v. *Hope*, L. J., 56 Ch. D., 363, *Bickerton* v. *Walker*, L. R., 13 Ch. D., 151, and *Rice* v. *Rice*, 2 Drew, 73, referred to.

Basti Begam v. Banarsi Prasad, I. L. R., 30 All. ... 297

——— SECTION 54 — *Sale —Non-payment of consideration—Sale nevertheless complete.*] In a sale of immovable property non-payment of the purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser, and the purchaser can, notwithstanding such non-payment, maintain a suit for possession of the property. *Shib Lal* v. *Bhagwan Das*, I. L. R., 11 All., 244, *Umedmal Motiram* v. *Davu bin Dhondiba*, I. L. R., 2 Bom., 547, and *Sagaji* v. *Namdev*, I. L. R., 23 Bom., 525, followed.

Baijnath Singh *v.* Paltu, I. L. R., 30 All. 125

——— SECTION 55 (4) (*b*), *See* Act No. XV of 1877, schedule II, articles 111 and 132 ... 172

——— SECTION 68 (*c*)—*Mortgage—Construction of document—Power of sale in a usufructuary mortgage.*] A mortgage-deed which was primarily usufructuary provided that if the mortgagor failed to deliver possession, or if the mortgagee was dispossessed from the mortgaged premises, he might recover the amount of the mortgage debt from the mortgagor and the mortgaged property. *Held* that the mortgagee failing to get possession was competent to sue for and obtain a decree for sale of the mortgaged property. *Jafar Husen* v. *Ranjit Singh*, I. L. R., 21 All., 4, and *Kashi Ram* v. *Sardar Singh*, I. L. R., 28 All., 157, referred to.

Narpat *v.* Ram Saran Das, I. L. R., 30 All. 162

——— SECTION 85—*Mortgage—Suit for sale on a mortgage—Parties.*] Whether or not section 85 of the Transfer of Property Act, 1882, refers solely to

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persons interested in the equity of redemption, it is not essential to join as a party defendant in a suit for sale on a mortgage a person whose interest in the mortgaged property, if it exists, would be antagonistic to the claims of both mortgagor and mortgagee. *Jaggeswar Datt* v. *Bhuban Mohan Mitra*, I. L. R., 33 Calc., 425, referred to.

Khairati *v.* Banni Begam, I. L. R., 30 All. 240

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 88 AND 89 —*Civil Procedure Code, section 258—Execution of decree—Alleged payment out of Court not certified.*] Applications for an order absolute for sale under section 89 of the Transfer of Property Act, 1882, are applications for the execution of the decree under section 88 of the Act. *Oudh Behari Lal* v. *Nageshar Lal*, I L. R., 13, All., 278, and *Mallikarjunadu Setti* v. *Lingamurti Pantulu*, I. L. R., 25, Mad., 244, referred to. To such applications section 258 of the Code of Civil Procedure is applicable and bars the recognition of payments made out of court in pursuance of the decree unless such payments are certified to the Court in the manner prescribed by the section. *Vaidhinadasamy Ayyar* v. *Samasundram Pillai*, I. L. R., 28, Mad., 473, followed. *Mullikarjuna Sastri* v. *Narasimha Rao*, I. L. R., 24 Mad., 412, and *Hatem Ali Khundkar* v. *Abdul Ghaffur Khan*, 8. C. W. N., 102, dissented from.

Hakim Singh *v.* Ram Singh, I. L. R., 30 All. 248

SECTION 91—*Mortgage —Fixed rate tenant—Suit by zamindar to redeem a mortgage made by a fixed rate tenant on the death of the tenant without heirs.*] *Held* that the zamindar is not within the meaning of section 91 of the Transfer of Property Act, 1882, a person having an interest in the mortgaged property so as to entitle him to redeem a mortgage of his holding made by a tenant at fixed rates who has died without heirs. *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor*, L. R., 3 I. A., 92, referred to.

Ram Dihal Rai *v.* The Maharaja of Vizianagram, I. L. R., 30 All. 488

SECTION 91—*Redemption of mortgage—Reversionary heirs of deceased husband of Hindu widow not entitled to redeem mortgage made by husband.*] *Held* that the reversionary heirs of the deceased husband of a Hindu widow in possession as such of her husband's property are not persons who, within the meaning of section 91 of the Transfer of Property Act, 1882, have such an interest in the mortgaged property, as would entitle them during the life-time of the widow to redeem a mortgage made by the husband.

Ram Chandar *v.* Kallu, I. L. R., 30 All. 497

SECTION 92, *See* Civil Procedure Code, section 43 225

SECTIONS 92 AND 94—*Mortgage—Redemption—Subsequent suit for profits received by mortgagee barred.*] In a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagee right up to the time of actual redemption or sale, as the case may be. A mortgagor therefore who has obtained a decree for redemption and paid in what was found by the decree to be due from him cannot subsequently sue for profits realized by the mortgagee in possession, which might and ought to have been taken into account at the time of passing the decree. *Vinayak Shivrao Dighe* v. *Dattatraya Gopal*, I. L. R., 26 Bom., 661, referred to.

Kashi *v.* Bajrang Prasad, I. L. R., 30 All. ... 36

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ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 99—*Civil Procedure Code, section* 316—*Mortgage — Simple money decree accepted by mortgagee—Sale of mortgaged property in execution of such decree.*] Even though the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money decree, he is precluded by section 99 of the Transfer of Property Act, 1882, from bringing the mortgaged property to sale in execution of the simple money decree. *Madho Prasad Singh* v. *Baijnath*, Weekly Notes, 1905, p. 152, followed. But if such a sale does in fact take place and is confirmed and a certificate is granted to the auction purchaser the sale cannot afterwards be impeached upon the ground that it was in violation of section 99 of the Transfer of Property Act. *Madan Makund Lal* v. *Jamna Kaulapuri*, Weekly Notes, 1907, p. 48, *Raj Kishore De Sarkar* v. *Dina Nath Chandra*, 12 C. W. N., lx, *Thaleri Pathumma* v. *Thandora Mammad*, 10 M.L. J., 110, *Durga Charan Mandal* v. *Kali Prasanna Sarkar*, I. L. R., 26 Calc., 727, and *Umed* v. *Jas Ram*, I. L. R., 29 All., 612, referred to. *Sonu Singh* v. *Bihari Singh*, I. L. R., 33 Calc., 283, dissented from.

Kishan Lal *v.* Umrao Singh, I. L. R., 30 All. ... 146

——— XVI (JHANSI INCUMBERED ESTATES ACT), SECTIONS 8 AND 28—*Mortgage—Unlawful consideration—Act No. IX of* 1872 *(Indian Contract Act), section* 23—*Act No. IV of* 1882 *(Transfer of Property Act), section* 43.] *Held* that a mortgage executed by a mortgagor who was at the time disqualified under section 8 of the Jhansi Incumbered Estates Act, 1882, was a contract entered into for an unlawful consideration within the meaning of section 23 of the Indian Contract Act, and section 43 of the Transfer of Property Act, 1882, could not be prayed in aid to empower the mortgagee to bring a suit for foreclosure after the mortgagors' disability had ceased.

Radha Bai *v.* Kamod Singh, I. L. R., 30 All. ... 38

———1889 — VII (SUCCESSION CERTIFICATE ACT), SECTION 4—"*Debt*"—*Deferred dower.*] *Held* that the dower of a Muhammadan wife, whether prompt or deferred, is a "debt" within the meaning of section 2 of the Succession Certificate Act, 1889, and that in a suit for its recovery brought by the heirs of the deceased wife against the husband no decree can be passed in favour of the plaintiff in the absence of the certificate required by the Act. *Nemdari Roy* v. *Mussummat Bissessari Kumari*, 2 C. W. N., 591, dissented from. *Mahamed Ishaq* v. *Sheikh Akramul-Huq*, 12 C. W. N., 84, distinguished. *Webb* v. *Stenton*, L. R., 11 Q. B. D., 518, referred to.

Abdul Karim Khan *v.* Maqbul-un-nissa Begam, I. L. R., 30 All. 315

———1890 — VIII (GUARDIANS AND WARDS ACT) — *Guardian and minor—Arbitration—Appointment of guardian not to be settled by arbitration.*] The appointment of a guardian to a minor, not being a matter of private right as between parties, is not a question which can be settled by reference to arbitration.

Mahadeo Prasad *v.* Bindesri Prasad, I. L. R., 30 All. ... 137

——— SECTIONS 29 AND 31—*Guardian and minor—Mortgage of minor's property to secure a loan sanctioned by the Court—Interest.*] In all cases where sanction is given for the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction not only the amount to be raised and the property to be mortgaged, but also the rate of

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interest, or at least the maximum rate of interest, at which the loans are to be raised. If nothing is said in the order as to the rate of interest, the lenders are entitled only to a reasonable rate of interest on the moneys advanced. *Ganga Pershad Sahu* v. *Maharani Bibi*, I. L. R., 11 Calc., 379, followed.

Thakur Prasad *v.* Gauripat Rai, I. L. R., 30 All. ... 188

ACTS—1893—IV (PARTITION ACT), SECTION 4—*Act No. IV of* 1882 (*Transfer of Property Act*), *section* 44—"*Undivided family*"—*Section* 4 *of the Partition Act applicable to Muhammadans*]. *Held* that Muhammadans are not excluded from the benefit of section 4 of the Partition Act, Act No. IV of 1893. *Katka Parshad* v. *Bankey Lall*, 9 Oudh Cases, 158, approved. *Amme Raham* v. *Zia Ahmad*, I. L. R., 13 All., 282, referred to. *Hashmat Ali* v. *Muhammad Umar*, I. L. R., 29 All., 308, overruled.

Sultan Begam *v.* Debi Prasad, I. L. R., 30 All. ... 324

——1894—I (LAND ACQUISITION ACT), SECTION 49—"*House, manufactory or building*"—*Acquisition of part only required—Whether whole must be purchased.*] Land which is not a house, manufactory or building in the literal sense and which is not reasonably required for the full and unimpaired use of a house, manufactory or building cannot be considered as part of the "house, manufactory or building" within the meaning of section 49 of Act No. I of 1894. Whether or not the land is so reasonably required is a question of fact depending upon the particular circumstances of each case. *Khairati Lal* v. *The Secretary of State for India in Council*, I. L. R., 11 All., 378, distinguished.

Nita Ram *v.* The Secretary of State for India in Council I. L. R., 30 All. 176

——IX—(PRISONS ACT), section 3(3), *See* Criminal Procedure Code, sections 123 and 397 334

——1896—XII (EXCISE ACT), SECTIONS 44 (2), 48 AND 57—*Definition—Excise officer—Jurisdiction.*] *Held* that a head constable is an Excise Officer within the meaning of section 57 of the Excise Act, 1896. *Queen-Empress* v. *Makunda*, I. L. R., 20 All., 70, followed.

Emperor *v.* Lachmi Narain, I. L. R., 30 All. 377

——1899—II (INDIAN STAMP ACT), SECTIONS 40, 44, 48 AND 55 *et seqq—Stamp—Improperly stamped document tendered in evidence—Stamp duty from whom recoverable.*] If a plaintiff produces in Court in support of his claim an unstamped or improperly stamped document, he primarily is the person from whom the requisite stamp duty and penalty may be recovered under section 40 of the Indian Stamp Act, 1899.

Secretary of State for India in Council *v.* Basharatullah, I. L. R., 30 All. 271

——(LOCAL)—1900—I (*United Provinces Municipalities Act*), *section* 3 (4)—*Definition*—"*Street.*"] *Held* that a lane which, though at one time private property, had been for upwards of thirty years used by the public generally and had been lighted, drained and swept by the Municipality, was a "street" within the meaning of section 3 of the Municipalities Act, 1900, and was not the less a street because it happened to be a cul-de-sac.

Municipal Board of Bulandshahr *v.* Dakkhan Lal, I. L. R., 30 All. 70

——1901—II (AGRA TENANCY ACT), SECTION 22—*Occupancy holding—Succession.*] Under the Agra Tenancy Act of 1901 the

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personal law of the parties concerned is no longer applicable to the case of succession to an occupancy holding, but the holding descends to all the male lineal descendants in the male line of descent of the last owner, without exclusion, by the nearer of the more remote.

Bhura *v.* Sahab-ud-din, I. L. R., 30 All. 128

ACTS—(LOCAL) 1901—II (AGRA TENANCY ACT), SECTION 22—*Occupancy holding—Succession—"Male lineal descendant"—Illegitimate son—Hindu law.*] *Held* that the illegitimate son of a man belonging to one of the Sudra caste by a kept woman, or continuous concubine, was capable of succeeding to the occupancy holding of his father as a "male lineal descendant" within the meaning of section 22 of the Agra Tenancy Act, 1901. *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver,* 13 Moo., I. A., 141. *Sarasuti* v. *Mannu,* I. L. R. 2 All., 134, and *Hargobind Kuari* v. *Dharam Singh,* I. L. R., 6 All., 329, referred to.

Ram Kali *v.* Jamuna, I. L. R., 30 All. 508

——— SECTION 32—*Exproprietary holding—Suit for possession of half of an exproprietary holding*]. The plaintiffs sued to recover possession of one half of an exproprietary holding, and added a prayer for "any other relief which might in the opinion of the Court be deemed just and proper." *Held* that the suit for possession of half of the exproprietary holding would not lie, being opposed to section 32 of the Agra Tenancy Act, 1901, but that, on the finding that the plaintiffs' share in the holding was one half, the plaintiffs were entitled to a decree declaring their right to a half share.

Ashiq Husain *v.* Asgari Begam, I. L. R., 30 All. ... 90

——— SECTION 177 — *Question of proprietary title — Jurisdiction — Civil and Revenue Courts.*] *Held* that the question whether a tenant, defendant in a suit for ejectment, is a tenant of one kind or another is not a question of proprietary title within the meaning of section 177 of the Agra Tenancy Act, 1901. *Chhitar Singh* v. *Rup Singh,* Weekly Notes, 1906, p. 247, dissented from.

Niranjan *v.* Gajadhar, I. L. R., 30 All. 133

——— SECTIONS 177, 199, 200—*Question of proprietary title—Appeal—Civil and Revenue Courts—Jurisdiction.*] When a Revenue Court, under the powers conferred on it by section 199 of the Agra Tenancy Act, 1901, decides a question of proprietary title it becomes for the moment a Civil Court; an appeal lies at the instance of either party to the District Judge, and if such an appeal is wrongly preferred to and decided by a Commissioner, such decision will have no effect in preventing the Revenue Court's decree from becoming final.

Genda *v.* Sukh Nath Rai, I. L. R., 30 All. 25

——— SECTION 199 *(a)*—*Limitation—Defendant referred to Civil Court—Act No. XV of* 1877 *(Indian Limitation Act), schedule II, article* 120.] When under section 199 of the Agra Tenancy Act, 1901, an order is passed by a Revenue Court directing the defendants to file a suit in a Civil Court within the time limited by that section, the ordinary period of limitation is thereupon suspended and the special period provided by the Tenancy Act is substituted.

The defendant filed a suit in the Civil Court within three months. It was decided against them. They appealed and in appeal withdrew their suit with liberty to bring a fresh suit. *Held* that the fresh suit filed after the expiry of the period limited

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by the order of the Revenue Court, was barred and the defendants could not fall back upon the provisions of the Indian Limitation Act, 1877.

Banwari Lal *v* Musammat Gopi, I L. R., 30 All. ... 44

ACTS—(LOCAL) — 1901—II (AGRA TENANCY ACT), SECTION 201—*Act No. I of 1872 (Indian Evidence Act), section 4—Evidence—Presumption—Record of plaintiff's name as a co-sharer.*] *Held* on a construction of section 201 of the Agra Tenancy Act, 1901, that the words "if in any suit instituted under the provision of Chapter XI: . . . the plaintiff is recorded as having such proprietary right, the Court shall presume that he has it" mean that, so far as the Revenue Court is concerned, such Court is bound to presume in favour of the plaintiff, and it is for the defendant "to establish by suit in the Civil Court that the plaintiff has no such proprietary right." *Dhanka* v. *Umrao Singh*, I. L. R., 30 All., 58, and *Dil Kunwar* v. *Udai Ram*, I. L. R., 29 All., 148, dissented from. The judgment of Richards, J., in *Dhanka* v. *Umrao Singh*, Weekly Notes, 1907, p. 43, followed. *Banwari Lal* v. *Niadar*, I. L. R., 29 All., 158, explained.

Bechan Singh *v.* Karan Singh, I. L. R., 30 All. ... 447

——— SECTION 201—*Act No. I of 1872 (Indian Evidence Act), section 4—Evidence—Presumption—Record of plaintiff's name as a co-sharer.*] *Held* that the presumption enjoined by section 201, clause (3) of the Agra Tenancy Act, 1901, is not conclusive, but may be rebutted by evidence offered to the contrary. *Banwari Lal* v. *Niadar*, I. L. R., 29 All., 158, referred to.

Dhanka *v.* Umrao Singh, I. L. R., 30 All. 58

——— 1903—I (BUNDELKHAND ENCUMBERED ESTATES ACT), *sections 2 and 12—Joint decree—Execution of decree—Effect of some out of several joint judgment-debtors taking advantage of the Act.*] Five out of six joint judgment-debtors took the benefit of the Bundelkhand Encumbered Estates Act, 1903. A notification was issued under the Act, but the decree-holders did not make any claim within the time prescribed. *Held* that the decree-holders could not recover from the judgment-debtor who had not taken advantage of the Act anything more than his proportionate share of the judgment debt.

Makund Rao *v.* Janki Bai, I. L. R., 30 All. ... 141

ADOPTION, *See* Act No. I of 1872, section 115] 549

——— *See* Hindu Law 197

ADVERSE POSSESSION, *See* Mortgage 119

ANCESTRAL PROPERTY, *See* Execution of decree 192

APPEAL—*Parties—Estoppel—Procedure.*] The plaintiff having obtained a decree against one of two defendants acquiesced in that decree, but the defendant judgment-debtor appealed, making the other defendant also a party to his appeal with the result that the plaintiff's suit was dismissed. *Held* that it was not open to the plaintiff in second appeal to contend that the Court below should have made a decree against that defendant with regard to whom he had acquiesced in the dismissal of his suit. *Farzand Ali Khan* v. *Bismillah Begam*, I. L. R., 27 All., 23 followed.

Lohre *v.* Deo Hans, I. L. R., 30 All. 48

——— *See* Act No. VII of 1870, section 7, IX; schedule I, article 1 ... 547

——— *See* Act No. XV of 1877, schedule II, article 179 385

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APPEAL *See* Act (Local) No. II of 1901, sections 177, 199, 200 ... 25
——— *See* Civil Procedure Code, section 244 486
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——— *See* Civil Procedure Code, sections 473 (*c*), 588 (23) ... 22
——— *See* Civil Procedure Code, section 508 169
——— *See* Civil Procedure Code, sections 522, 526 151
——— *See* Civil Procedure Code, section 549 143
——— *See* Civil Procedure Code, section 562 191
——— *See* Civil Procedure Code, sections 562, 588 (28) 479
——— *See* Civil Procedure Code, sections 574 and 551 319
——— *See* Guardian *ad litem* 55
——— *See* Procedure 103
ARBITRATION, *See* Act No. VIII of 1890 137
——— *See* Civil Procedure Code, section 506 32
——— *See* Civil Procedure Code, section 508 169
——— *See* Civil Procedure Code, sections 508 *et seqq.* ... 505
——— *See* Civil Procedure Code, sections 522, 526 ... 151
ARIAT, *See* Muhammadan law 309
ATTACHMENT, *See* Civil Procedure Code, section 266 252
——— *See* Civil Procedure Code, section 266 246
AWARD, *See* Civil Procedure Code, sections 522, 526 151
BENAMIDAR—*Suit for sale on a mortgage—Decree giving benamidar a right to redeem—Right to redeem not availed of—Subsequent suit for redemption by alleged beneficial owner barred.*] A decree for sale on a mortgage was passed giving a right of redemption to a puisne mortgagee. The puisne mortgagee did not redeem and the decree became absolute. *Held* that no subsequent suit for redemption would lie by a person alleging that he was the real puisne mortgagee and that the person whose name appeared in the decree as puisne mortgagee was merely a benamidar.
Kaniz Fatima *v.* Wali-Ullah, I. L. R., 30 All. ... 30
BOND, *See* Act No. XV of 1877, schedule II, article 75 123
BURDEN OF PROOF, *See* Hindu Law 156, 197
——— *See* Civil Procedure Code, section 283 ... 321
CESS, *See* Wajib-ul-arz 235
CHARGE. *See* Criminal Procedure Code, sections 234 and 235 ... 351
CIVIL AND REVENUE COURTS, *See* Act (Local) No. II of 1901, section 177 133
——— *See* Act (Local) No. II of 1901, sections 177, 199, 200 25
——— *See* Civil Procedure Code, section 13 470
——— PROCEDURE CODE, SECTION 13—Res judicata—*Question of right to receive a recurring payment—Civil and Revenue Courts—Revenue Court deciding a question of title.*] The plaintiffs sued to recover their share of an annuity chargeable on a 7½ biswa share of a certain village for the years 1309, 1310 and 1311 Fasli. In a previous suit between the same parties in respect of the years 1306, 1307 and 1308, the plaintiffs' right to receive the annuity had been

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admitted by the defendant, and a decree passed accordingly which had been affirmed by the High Court.

Held that the fact that the two suits related to different years did not prevent the judgment in the former operating as *res judicata* in the latter. *Chandi Prasad Maharaja Mahendra Mahendra Singh*, I. L. R., 24 All., 112 followed. Neither did the fact that the first decision was that of a Court of Revenue make any difference. Either the suit was wrongly brought in a Revenue Court, a defect which was cured by its coming to a Civil Court in appeal; or the Revenue Court deciding a question of title might be regarded *quoad hoc* as a Civil Court. *Salig Dube* v. *Deoki Dube*, Weekly Notes, 1907, p. 1, referred to.

Dwarka Das *v.* Akhay Singh, I. L. R., 30 All. 470

CIVIL PROCEDURE CODE, SECTIONS 16 AND 19—*Misjoinder of parties—Mutlifariousness—Suit by heir to recover property from co-heir and transferees from him—Property situate in different districts Compromise of part of claim—Jurisdiction.*] The plaintiff sued as heiress of her father to recover from her brother and from certain transferees from him her share in the property of her deceased father. The suit was brought in the Court of the Subordinate Judge of Bareilly. Part of the property claimed was situated in the Bareilly district and part in the district of Bara Banki in Oudh. During the course of the suit a compromise was arrived at regarding the Bareilly property and the suit proceeded with reference to the property in Oudh alone. *Held* (1) that the plaintiff had properly impleaded her brother and the transferees from him as co-defendants in one suit, and (2), that there being no fraud or improper motive alleged with reference either to the compromise or to the filing of the suit in the Court at Bareilly, the Court was not by reason of the compromise divested of jurisdiction to hear and decide the suit in respect of the property situate in Oudh. *Ram Raji* v. *Dhup Narain*, Weekly Notes, 1885, p. 125, overruled. *Indar Ruar* v. *Gur Prasad*, I. L. R., 11 All., 33, *Mazhar Ali Khan* v. *Sajjad Husain Khan*, I. L. R., 24 All., 358, *Parbati Kunwar* v. *Mahmud Fatima*, I. L. R., 29 All., 267, *Ishan Chunder Hazra* v. *Rameswar Mondul*, I. L. R., 24 Calc., 831, and *Nundo Kumar Nasker* v. *Banomali Gayan*, I. L. R., 29 Calc., 871, referred to. *Ganeshi Lal* v. *Khairati Singh*, I. L. R., 16 All., 279, distinguished. *Khatija* v. *Ismail*, 1. L. R., 12 Mad., 380, followed.

Kubra Jan *v.* Ram Bali, I. L. R., 30 All. 560

——— SECTION 34—*Non-joinder of parties—Objection not taken at the earliest opportunity—Limitation.*] An objection as to the non-joinder of parties alleged to be necessary ought to be raised by the defendant at the earliest opportunity; where this is not done and the parties omitted are in consequence not added until after the expiry of the period of limitation for a suit against them, the defendant will not be permitted to take advantage of the bar of limitation.

Pateshri Partap Narain Singh v. *Rudra Narain Singh*, I. L. R., 26 All., 528, and *Guruvayya Gouda* v. *Dattatraya Anant*, I. L. R., 28 Bom., 11, followed. *Shamrathi Singh* v. *Kishan Prasad*, I. L. R., 29 All., 311, distinguished.

Hazari Mal *v.* Bhawani Ram, I. L. R., 30 All. ... 538

——— section 13, *See* Hindu law 394

——— SECTION 43—*Usufructuary mortgage—Suit for redemption—Subsequent suit to recover surplus profits—Act No. XV of* 1877 *(Indian Limitation Act), Schedule II, Article* 105—*Act No. IV of* 1882 *(Transfer of Property Act), section* 92.] In a

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suit for redemption of a usufructuary mortgage the mortgagor is bound to claim for surplus profits, if any, payable by the mortgagee. Section 43 of the Code of Civil Procedure is a bar to the recovery of such profits by means of a separate suit.

Article 105 of the second schedule to the Indian Limitation Act, 1877, applies to a case where the mortgagor gets possession otherwise than by means of a suit for redemption.

Vinayak Shivrao Dighe v. *Dattatraya Gopal*, I. L. R., 26 Bom., 661, *Rukhminibai* v. *Venkatesh*, I. L R., 31 Bom., 527, *Satyabadi Behara* v. *Harabati*, I. L. R., 34 Calc., 223, *Kashi* v. *Bajrang Prasad*, I. L. R., 30 All., 36, and *Balaji* v. *Tamanganda*, 6 Bom., H. C., Rep. 97, referred to.

Ram Din *v.* Bhup Singh, I. L. R., 30 All. 225

CIVIL PROCEDURE CODE, SECTIONS 43, 373—*Act No. XV of* 1877 *(Indian Limitation Act), schedule II, article* 106—*Suit for division of alleged partnership assets—Separate suits for property at different places.* The plaintiff sued for possession of one-half of certain property in the Moradabad district, alleging that it had been purchased out of the profits of a partnership subsisting between himself and the defendant. Other similar property in Naini Tal was mentioned in the plaint, but the plaintiff said he would bring a separate suit in respect of that property. The first suit was withdrawn, but without permission being granted to bring a fresh suit. Subsequently a second suit was brought in Naini Tal respecting the property there. The plaintiff alleged himself to be in possession of this property, but it was found that he was not. *Held* that the second suit was barred by the operation of section 43 as well as of section 373 of the Code of Civil Procedure, as also, on the finding that the partnership had been dissolved more than three years before suit, by article 106 of the second schedule to the Limitation Act.

Niaz Ahmad *v.* Abdul Hamid, I. L. R., 30 All. ... 279

——————— SECTION 206, *See Ib.* section 551 ... 290

——————— SECTION 232—*Decree for possession of immovable property—Sale of property decreed—Right to execute decree.* If a decree-holder holding a decree for possession of immovable property sells a portion of such property, the sale does not, without express provision to that effect give the purchaser any right to execute the decree himself. *Ram Sahai* v. *Gaya*, I. L. R., 7 All., 107, referred to.

Hansraj Pal *v.* Mukhraji Kunwar, I. L. R., 30 All. ... 28

——————— SECTION 244—*Execution of decree—Purchase at auction sale by decree-holder—Suit by decree-holder to obtain possession of property so purchased.*] Where the decree-holder himself purchases property at auction sale in execution of his own decree, but fails to obtain possession, his remedy is by application under section 244 of the Code of Civil Procedure: he cannot bring a separate suit for possession. *Seru Mohan Bania* v. *Bhagoban Din Pande*, I. L. R., 9 Calc., 602, and *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal*, I. L. R, 14 Calc., 644, distinguished. *Madhusudan Das* v. *Gobinda Pria Chowdhurani*, I. L. R, 27 Calc., 34, *Kattayat Pathumayi* v. *Raman Menon*, I. L. R. 26 Mad., 740, and *Kalian Singh* v. *Thakur Das*, Weekly Notes, 1906, p. 87, followed, *Prosunno Coomar Sanyal* v. *Kali Das Sanyal*, L. R, 19 I. A., 169, referred to.

Sheo Narain *v.* Nur Muhammad, I. L. R., 30 All. ... 72

——————— SECTION 244—*Question relating to the execution, discharge or satisfaction of the decree—Contest between the*

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holder of a decree for an undivided share of joint property and an auction purchaser pendente lite.] One Wilayati Begam obtained a decree for possession of a share in certain joint and undivided zamindari property, and this decree was executed so far as might be by delivery of formal possession. While the suit in which this decree was passed was pending, one Raghunath Das obtained a simple money decree against another co-sharer in the zamindari and in execution thereof brought the property to sale and it was purchased by Nand Kishore. Nand Kishore got possession. Wilayati Begam applied for mutation of names in her favour, but was resisted by Nand Kishore, and accordingly instituted a suit against Nand Kishore praying for a declaration of her title as against him. *Held* that such a suit was not obnoxious to the prohibition contained in section 244 of the Code of Civil Procedure. *Gulzari Lal* v. *Madho Ram*, I. L. R., 26 All., 447, distinguished. *Jagan Nath* v. *Milap Chand*, I. L. R., 28 All., 722, and *Kino* v. *Rudkin*, L. R., 6 Ch. D., 160, referred to.

Wilayati Begam *v.* Nand Kishore, I. L. R., 30 All. ... 231

CIVIL PROCEDURE CODE, SECTION 244—*Official Assignee—Disallowance of claim of Official Assignee to have proceeds of sale in execution of decree against insolvent judgment-debtor paid to him—Appeal.*] *Held* that the Official Assignee not being the representative of an insolvent judgment-debtor, no appeal would lie against the disallowance of his claim to have the proceeds of a sale in execution of a decree against an insolvent judgment-debtor paid over to him. *Kashi Prasad* v. *Miller*, I. L. R., 7 All., 752, *Sardarmal* v. *Aranvayal Sabhapathy*, I. L. R., 21 Bom., 205, and *Chandmull* v. *Ranee Soondery Dossee*, I. L. R., 22 Calc., 259, referred to.

Grey, Official Assignee, *v.* Hazari Lal, I. L. R., 30 All. ... 486

——— SECTIONS 244, 258—*Execution of decree—Uncertified payment out of court—Subsequent execution by decree-holder—Suit to recover sum paid out of court.*] A judgment-debtor made a part payment of what was due under the decree against him to the decree-holder, but such payment was not certified in the manner required by section 258 of the Code of Civil Procedure, and the decree-holder in consequence was able to take out execution and get the amount paid twice over. *Held* that a suit by the judgment-debtor to recover the amount paid out of Court to the decree-holder was not barred either by section 244 or by section 258 of the Code. *Shadi* v. *Ganga Sahai*, I. L. R., 3 All., 538, and *Periatambi Udayan* v. *Vellaya Goundan*, I. L. R., 21 Mad., 409, followed.

Gendo *v.* Nihal Kunwar, I. L. R., 30 All. 464

——— SECTION 248—*Execution of decree—Limitation—Act No. XV of 1877, schedule II, article 179(5)—Date of issuing notice.*] *Held* that the expression "the date of issuing notice under the Code of Civil Procedure, section 248," as used in article 179 (5) of the second schedule to the Indian Limitation Act, 1877, means the date upon which the Court passes an order for issue of a notice under section 248, not the date upon which such notice actually issues.

Jumai Kanjar *v.* Abdul Karim Khan, I. L. R., 30 All. ... 536

——— SECTION 258, *See* Act No. IV of 1882, sections 88 and 89 248

——— SECTION 266—*Execution of decree—Attachment—Right to attach profits not yet due.*] *Held* that a mere right to receive profits, the profits in question not having yet

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accrued due, is not susceptible of attachment in execution of a decree. *Hari Das Acharjia Chowdhry* v. *Baroda Kishore Acharjia Chowdhry*, I. L. R., 27 Calc., 38, *Udoy Kumari Ghatwalin* v. *Hari Ram Shaha*, I. L. R., 28 Calc., 483, *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*, 14 Moo., I. A., 40, *Jones* v. *Thompson*, 27 L. J. Q. B. D., 234, and *Webb* v. *Stenton*, 11 Q. B. D., 518, referred to.

Sher Singh *v.* Sri Ram, I. L. R., 30 All. 246

CIVIL PROCEDURE CODE, SECTION 266—*Execution of decree—Attachment—Mortgage—Right of mortgagor in respect of money promised but not paid.*] Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance: he cannot sue for specific performance of the agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which can be the subject of attachment and sale under section 266 of the Code of Civil Procedure. *The South African Territories Company, Limited* v *Wallington* A. C., 309, referred to.

Phul Chand *v.* Chand Mal, I. L. R., 30 All. 252

——— SECTION 283 — *Suit for declaration of title by person whose objections to execution have been disallowed—Burden of proof—Held* that a party intervening in the execution department, and failing in his objections to an attachment, and consequently being obliged to bring a suit under section 283 of the Code of Civil Procedure, must give *primâ facie* evidence to establish the genuineness of the document upon which he relies. *Tulshi Rai* v. *Ram Das*, Weekly Notes, 1887, p. 71, *Afzal Begam* v. *Muhammad Obaidat-ullah Khan*, Weekly Notes, 1899, p. 220, *Ram Nath* v *Bindraban*, I. L. R., 18 All., 369, and *Govind Atmaram* v. *Santai*, I. L. R., 12 Bom., 270, followed. *Suba Bibi* v. *Balgobind Das*, I. L. R., 3 All., 178, discussed.

Nannhi Jan v. Bhuri, I. L. R., 30 All. 321

——— SECTION 283, *See* Act No. IX of 1872, sections 69 and 70 167

——— SECTIONS 306, 293—*Execution of decree—Sale in execution—Non-payment by purchaser of deposit required by law—Fresh sale—Claim by auction purchaser for difference of price on resale.*] Certain immovable property was put up to auction in execution of a decree and purchased by A. B., but the purchaser did not at once make the deposit required by section 306 of the Code of Civil Procedure, and the property was subsequently—but not "forthwith"—put up again to auction and sold for a considerably less sum to the decree-holder. *Held* that the first sale was not merely irregular, but no sale at all, and that the decree-holder was not entitled to claim against the first purchaser under section 293 of the Code, compensation for the loss resulting on the second sale. *Intizam Ali Khan* v. *Narain Singh*, I. L. R., 5 All., 316, followed.

Amir Begam *v.* The Bank of Upper India, Limited, I. L. R., 30 All. 273

——— SECTIONS 310A, 244 AND 588—*Question relating to the execution, discharge or satisfaction of a decree—Appeal—Auction purchaser representative of judgment-debtor, not of decree-holder.*] A purchaser at an auction sale in execution of a decree is the representative of the judgment-debtor, not of the decree-holder. *Manickka Odayan* v. *Rajagopala Pillai*, I. L. R., 30 Mad., 507, dissented from.

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Where therefore a judgment-debtor's application under section 310A of the Code of Civil Procedure had been allowed, it was *held* that no appeal by the auction purchaser would lie, inasmuch as no appeal was given by section 588, nor did the case fall within the purview of section 244 of the Code. *Bashir-ud-din* v. *Jhori Singh*, I. L. R., 19 All., 140, followed. *Kuber Singh* v. *Sahib Lal*, I. L. R., 27 All., 263, *Gulzari Lal* v. *Madho Ram*, I. L. R., 26 All., 447, *Maganlal Mulji* v. *Doshi Mulji*, I. L. R., 25 Bom., 631, and *Raynor* v. *The Mussoorie Bank, Limited*, I. L. R., 7 All., 681, referred to. *Imtiazi Begam* v. *Dhuman Begam*, I. L. R., 29 All., 275, dissented from.

Anandi Kunwari *v.* Ajudhia Nath, I. L. R., 30 All. ... 379

CIVIL PROCEDURE CODE, SECTION 316, *See* Act No. IV of 1882, section 99 146

——— SECTION 318—*Act No. XV of* 1877 (*Indian Limitation Act*), *schedule II, article* 178—*Execution of decree—Limitation—Terminus a quo.*] Although the grant of a certificate is a necessary preliminary to an application under section 318 of the Code of Civil Procedure, such application will be barred under article 178 of the second schedule to the Indian Limitation Act, 1877, if not made within three years of the date of the certificate, that is to say, the date of the confirmation of sale. *Basapa* v. *Marya*, I. L. R., 3 Bom., 433, and *Kashinath Trimbak Joshi* v. *Duming Zuran*, I. L. R., 17 Bom., 228, dissented from. *Petition of Kishen Singh*, Weekly Notes, 1883, p. 262, referred to.

Ranjit Singh *v.* Baldeo Singh, I. L. R., 30 All. ... 390

——— SECTION 320, *See* execution of decree ... 192

——— , SECTION 362—*Parties—Death of sole appellant—All representatives not brought upon the record—Abatement of appeal.*] The sole appellant, a Muhammadan, died pending the appeal, leaving him surviving a widow, two sons and two daughters. The two sons applied to have themselves brought on to the record as appellants, but did not ask that their mother and sisters should be made parties to the appeal. An application to that effect made by the respondents was not acted upon by the lower appellate Court. *Held* that it was the duty of the sons to have brought upon the record, either as appellants or respondents, the other representatives of their father, and, as they had not done so, the appeal abated. *Ghamandi Lal* v. *Amir Begam*, I. L. R., 16 All., 211, followed.

Haidar Husain *v.* Abdul Ahad, I. L. R., 30 All. ... 117

——— SECTION 365—*Death of sole plaintiff—Claim of one of the defendants to continue the suit as plaintiff—Abatement of suit.*] The original plaintiff sued for redemption of a mortgage executed by her father. She claimed as the only unmarried daughter of three, arraying as defendants, besides the mortgagee, her surviving married sister and the minor children of the second sister, deceased. During the pendency of the suit the plaintiff died. *Held* that the claim being personal to the plaintiff, the suit abated and that the surviving sister could not be permitted to carry on the suit in substitution for the original plaintiff

Balak Puri *v.* Durga, I. L. R., 30 All. 49

——— SECTIONS 367, 588(18)—*Dispute as to who is the legal representative of a deceased appellant—Appeal.*] *Held* on a construction of section 367 of the Code of Civil Procedure that a dispute as to who is the legal representative of a deceased appellant is not confined to the case of rival claimants to represent

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the deceased. *Subbayya* v. *Saminadayyar*, I. L. R., 18 Mad., 496, followed.

Hanwant *v.* Ram Gopal Singh, I. L. R., 30 All. ... 348

CIVIL PROCEDURE CODE, SECTION 410, *See* Hindu law 95

——————— SECTION 447, *See* Guardian and minor ... 105

——————— SECTION 473 (*c*), 588 (23)—*Decree—Order—Appeal—Inter pleader suit.*] *Held* that an adjudication upon the claims of defendants in an interpleader suit is a decree and appealable as such under section 540 of the Code of Civil Procedure and not under section 588 of the Code.

Maharaj Singh *v.* Chittar Mal, I. L. R., 30 All. ... 22

——————— SECTION 503—*Receiver—Appointment of receiver to realize amounts of decrees.*] Where a decree-holder had in execution of his decree attached two decrees held by the judgment-debtor against third parties, it was *held* that section 503 of the Code of Civil Procedure gave power to the Court to appoint a receiver to realize the amounts of the attached decrees where it appeared that by so doing the interests of both decree-holder and judgment-debtor would be better protected.

Partab Singh *v.* The Delhi and London Bank, Ld., I. L. R. 30 All. 393

——————— SECTION 506 — *Arbitration — Reference made orally, but reduced to writing by the Court—Irregularity*] Where both parties to a pending suit consented to a reference to arbitration and an order of reference was then and there made by the Court in the presence of the parties, though not upon a written application, it was *held* that it was not open to the Court, having regard to the provisions of section 510 of the Code of Civil Procedure, to supersede that reference, the arbitrator not having declined to act. *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan*, 6 Moo. I A, 134, distinguished. *Shama Sundram Iyer* v *Abdul Latif*, I. L. R., 27 Calc., 61, and *Luxumibai* v. *Hajee Widina Cassum*, I. L. R., 23 Bom., 629, followed.

Abdul Hamid *v.* Riaz-ud-din, I. L. R., 30 All. ... 32

——————— SECTION 508—*Arbitration—Order of reference not fixing a period within which the award is to be made—Appeal.*] Where an order of reference to arbitration made by a Court omits to fix a date for the delivery of the award, such omission is not a mere irregularity but is a defect fatal to the order and to all subsequent proceedings founded thereon. *Chuha Mal* v. *Hari Ram*, I. L. R., 8 All., 548, followed. *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*, L. R., 18 I. A., 55 referred to.

Lachman Das *v.* Abparkash, I. L. R., 30 All. 169

——————— 508 et seqq—*Arbitration—Award—Award set aside—Court not empowered to make a second reference on the same submission.*] The parties to a suit pending in the Court of a Munsif referred the matters in dispute between them to arbitration. An award was made and delivered: but it was afterwards discovered that one of the plaintiffs had died before the termination of the arbitration proceedings, and the Munsif accordingly set aside the award. *Held* that the Munsif had no power to make a second order on the same agreement of the parties again referring to arbitration the matters in dispute between them.

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CIVIL PROCEDURE CODE, SECTIONS 522, 526—*Private arbitration—Award made a rule of Court—Appeal.*] When an award made in a private arbitration has been made a rule of Court and a decree passed thereon, no appeal will lie except so far as the decree is in excess of or not in accordance with the award. In this respect there is no difference between a decree based upon a private award and a decree based upon an award made through the intervention of the Court. *Mustafa Khan* v. *Phulja Bibi*, I. L. R., 27 All., 526, distinguished.

Bahadur Singh *v.* Negi Puran Singh, I. L. R., 30 All. ... 151

——— SECTION 549—*Security for costs—Non-compliance with order for security—Appeal rejected—Application to restore appeal—Application refused*]. *Held* that no appeal will lie from an order refusing to re-admit an appeal which had been rejected under section 549 of the Code of Civil Procedure on account of non-compliance with an order to furnish security for costs. *Lekha* v. *Bhauna*, I. L. R., 18 All., 101, followed. *Kuar Balwant Singh* v. *Kuar Doulat Singh*, I. L. R., 13 I. A., 57, distinguished.

Firozi Begam *v.* Abdul Latif Khan, I. L. R., 30 All. ... 143

——— SECTION 551—*Effect of dismissal of appeal—Amendment of decree—Civil Procedure Code, section* 206] *Held* that the dismissal of an appeal under section 551 of the Code of Civil Procedure is a decree and supersedes the decree of the Court below. The Court, therefore, which has taken action under section 551 is the only Court which has jurisdiction to amend the decree under section 206 of the Code of Civil Procedure. *Uma Sundari Devi* v. *Bindu Bashini Chowdharani*, I. L. R., 24 Calc., 759, *Peary Mohan* v. *Mohendra Nath*, 4 C.L. J., 566, and *Munisami Naidu* v. *Munisami Reddi*, I. L. R., 22 Mad., 293, followed. *Bapu* v. *Vajir*, I. L. R., 21 Bom., 548, dissented from. *Rudr Prasad* v. *Baijnath*, I. L. R., 15 All., 367, *Thakur of Masuda* v. *the widows of the Thakur of Nandwara*, I. L. R., 2 All., 819, *Kristnama Chariar* v. *Mangammal*, I.L.R., 26 Mad., 91, *Kistokinker Ghose Roy* v. *Burrodacaunt Singh Roy* 10 B. L. R., 101, *Akshoy Kumar Nundi* v. *Chundar Mohan Chathati*, I. L. R., 16 Calc., 250, *Murlidhar* v. *Tapesri Rai*, Weekly Notes, 1894, p. 46, *Royal Reddi* v. *Linga Reddi*, I. L. R., 3 Mad., 1, *Thakur Takhatsangji* v. *Bai Sundrabai*, Bombay P. J., 1891, p. 58, and *Kushal Chintaman* v. *Supdu Tapiram*, Bombay P. J., p. 299, referred to.

Asma Bibi v. Ahmad Husain, I. L. R., 30 All. ... 290

——— SECTION 562—*Remand—Appeal from order of remand after decision of the suit in accordance therewith.*] *Held* that no appeal will lie from an order of remand passed under section 562 of the Code of Civil Procedure, if such appeal is filed after the suit has been decided in compliance with the order of remand and no appeal is preferred from the decree in the suit. *Salig Ram* v. *Brij Bilas*, I. L. R., 29 All., 659, and *Madhu Sudan Sen* v. *Kamini Kanta Sen*, I. L. R., 32 Calc., 1023, followed.

Gulzari Mal *v.* Kabir-un-nissa, I. L. R., 30 All. ... 191

——— SECTIONS 562, 588 (28)—*Remand—Appeal from order of remand filed after decision of suit in accordance therewith.*]

Held that the fact that the suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. *Babu Lal* v. *Ram Kali*, I. L. R., 28 Calc., 113, followed. *Salig Ram* v. *Brij Bilas*, Weekly Notes, 1906, p. 28, overruled. *Ramcshur Singh* v. *SheoDin Singh*, I. L. R., 29 All., 659,

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Sheo Nath Singh v. *Ram Din Singh*, I. L. R., 12 All., 510, and *Jatinga Valley Tea Company* v. *Chera Tea Company*, I. L. R., 18 All., 19, referred to. *Madhu Sudan Sen* v. *Kamini Kanta Sen*, I. L. R., 12 Calc., 45, dissented from.

Uman Kunwari *v.* Jarbandhan, I. L. R., 30 All. ... 479

CIVIL PROCEDURE CODE, SECTIONS 574 AND 551—*Procedure—Appeal summarily dismissed—Court not bound to record a full judgment. Held* that the provisions of section 574 of the Code of Civil Procedure are not applicable in their entirety to the case of an appeal dismissed under section 551 of the Code. *Rami Deka* v. *Brojo Nath Saikia*, I. L. R., 25 Calc., 97, dissented from.

Samin Hasan *v.* Piran, I. L. R., 30 All. ... 319

——— SECTION 578—*Procedure—Irregularity—Disposal of a suit on a Sunday.*] *Held* that the fact that a suit was decided on a Sunday did not vitiate the decree. *Semble* that the Lord's Day Act (21 Geo. III, Cap. XLIX) does not apply to India. *Param Shook Doss* v. *Rasheed Ood Dowlah*, 7 Mad. H. C. Rep., 285, referred to.

Sheoram Tiwari *v.* Thakur Prasad, I. L. R., 30 All. ... 136

——— SECTION 562, *See* Hindu law 63

COMPROMISE, *See* Hindu law 75

——— Effect of—. *See* Hindu law 406

CONFESSION, *See* Act No. I of 1872, section 30 540

CONSIDERATION, *See* Act No. IV of 1882, section 54 125

CONSTRUCTION OF DOCUMENT, *See* Act No. IV of 1882, section 68 (*c*) 162

——— *See* Hindu law 84

——— *See* Pre-emption ... 77, 372, 544

——— *See* Wajib-ul-arz 235

——— *See* Will 455

CO-SHARER, *See* Pre-emption 329, 372

COUNTERFEITING COIN, *See* Act No. XLV of 1860, sections 28, 231 93

COURT FEE, *See* Act No. VII of 1870, section 7, IX; schedule I, article 1, 547

——— *See* Procedure 103

COWS. Slaughter of—*See* Public nuisance 181

CRIMINAL PROCEDURE CODE, SECTION 4 (*r*)—*Act No. XVIII of* 1879 (*Legal Practitioners Act*), *section* 9—*Mukhtars—Authority of mukhtar to practice in Criminal Courts*] A mukhtar is not entitled to practise generally and as of right in Criminal Courts, but can act only when he has received the permission of the Court to act in any particular proceeding.

Anant Ram, in the matter of the petition of I. L. R., 30 All. 66

——— SECTIONS 110 AND 526—*Security for good behaviour—Transfer.*] *Held* that proceedings under section 110 of the Code of Criminal Procedure cannot be transferred to any Court outside the district within which such proceedings have been lawfully instituted. *In the matter of the petition of Amar Singh*, I. L. R., 16 All., 9, and *In the matter of the petition of Gudar Singh*, I. L. R. 19 All., 291, followed.

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CRIMINAL PROCEDURE CODE, SECTIONS 123 AND 397—*Act No. IX of 1894 (Prisons Act), section 3(3)—Security for good behaviour—Imprisonment on failure to find security—"Sentence."*] *Held* that where a person is ordered by a Magistrate to be "detained in prison" pending the orders of the Sessions Judge under section 123 of the Code of Criminal Procedure such person must be considered as a person undergoing a sentence of imprisonment and not merely as an under-trial prisoner detained in custody.

Held also that an order for imprisonment on failure to furnish security for good behaviour is a "sentence" within the meaning of section 397 of the Code of Criminal Procedure. *Queen-Empress* v. *Diwan Chand*, Punjab Rec., 1895, Cr. J., page 45, referred to.

Emperor *v.* Tula Khan, I. L. R., 30 All. 334

——— SECTIONS 133 ET SEQQ.—*Procedure—Obstruction to a public way—Jury.*] Where, at the request of a person upon whom a notice has been served under section 133 of the Code of Criminal Procedure a jury is appointed under section 138 of the Code, it is within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed is not a public way. It is not for the Magistrate to decide whether such an objection is raised *bonâ fide* before referring it to the jury. *Kailash Chunder Sen* v. *Ram Lall Mittra*, I. L. R., 26 Calc., 869.

Held also that there is no special procedure laid down by the Code to be adopted by jury appointed under section 138 in coming to a finding on the questions submitted to them. *Queen-Empress* v. *Khushali Ram*, I. L. R., 18 All., 158, referred to.

Held also that a person who has applied for a jury under section 138 is bound by the verdict of the jury, and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of a *bonâ fide* claim of right. *In the matter of the petition of Lachman*, Weekly Notes, 1900, p. 180, followed.

Emperor *v.* Ram Bilas, I. L. R., 30 All. 364

——— SECTIONS 145, 435 and 537—*Revision—Procedure—Irregularity not prejudicial to either party.*] In the course of proceedings commenced under section 107 of the Code of Criminal Procedure it was found by the Magistrate that there was a dispute relating to land and likely to cause a breach of the peace between the two parties before him. After giving both an opportunity of being heard, the Magistrate passed an order under section 145 of the Code maintaining one party in possession *Held* that, notwithstanding that the procedure of the Magistrate was in some respects defective, there was no cause for the exercise of the revisional jurisdiction of the High Court, inasmuch as the parties had been given an opportunity of representing their respective cases, and there was nothing to show that the irregularities in procedure which had occurred had caused any prejudice to either. *In the matter of the petition of T. A. Martin*, I. L. R., 27 All., 296, referred to.

Debi Prasad *v.* Sheodat Rai, I. L. R., 30 All. 41

——— SECTION 145, *See* Act No. I of 1877, section 9 331

——— SECTION 195—*Sanction to prosecute—Jurisdiction to grant or revoke sanction.*] Application was made under section 195 of the Code of Criminal Procedure to a Magistrate of the 3rd class, who tried the original case, for sanction to prosecute

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the complainant. This application was refused. A further application was then made to the District Magistrate, who granted sanction. *Held* that the Sessions Judge had no power to set aside the order of the District Magistrate granting sanction.

Ram Deni *v.* Nand Lal Rai, I. L. R., 30 All. 109

RIMINAL PROCEDURE CODE, SECTION 195, *See* Act No. XLV of 1860, sections 182, 211 52

——— SECTIONS 195, 439 — *Sanction to prosecute—Revision—Powers of High Court.*] An application under section 195 of the Code of Criminal Procedure for sanction to prosecute was made to and granted by a Magistrate of the first class. A further application under section 195 of the Code to revoke the sanction was made to the Sessions Judge, but was rejected. *Held* that the High Court had power to send for the record of the case under section 435 and to interfere, if necessary, under section 439 of the Code of Criminal Procedure with these orders. *Kusal* v. *Badri*, Weekly Notes 1907, p. 283, overruled. *Muthuswami Mudali* v. *Veeni Chetti*, I. L. R., 30 Mad., 382, referred to.

Emperor *v.* Serh Mal, I. L. R., 30 All. 243

——— SECTIONS 234 AND 235 — *Charge—Misjoinder of charges—Illegality.*] An accused person was charged with and tried for, first, three separate acts of criminal misappropriation committed within a year, and secondly, two separate offences of forgery with intent to conceal two of such acts of criminal misappropriation. *Held* that this was an illegality not covered by the provisions of section 537 of the Code of Criminal Procedure.

Emperor *v.* Mata Prasad, I. L. R., 30 All. 351

——— SECTIONS 271, 342, *See* Act No. I of 1872, section 30 540

——— SECTION 439— *Revision — Practice—Discretion of Court as to entertainment of application in revision*] *Held* that it is not the practice of the High Court to entertain an application for revision on the criminal side, where there exists a lower Court having concurrent revisional jurisdiction, unless a similar application has first been made to the lower Court and has been rejected. *Emperor* v. *Kali Charan*, Weekly Notes 1904, p. 233 and *Gullay* v. *Bakar Husain*, I. L. R., 28 All., 268, followed.

Shafaqat-ul-lah *v.* Wali Ahmad Khan, I. L. R., 30 All. ... 116

——— SECTION 495, *See* Malicious prosecution, 525

CUSTOM—*Finding in favour of existence of custom based upon insufficient evidence—Second appeal—Practice.*] *Held* that where a question arises as to the existence or non-existence of a particular custom, and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence. *Hashim Ali* v. *Abdul Rahman*, I. L. R., 28 All., 698, approved. *Raj Narain Mitter* v. *Budh Sen*, I. L. R., 27 All., 388, referred to.

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DECREE, Amendment of—*See* Civil Procedure Code, section 551 ... 290
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———— *See* Act No. XLV of 1860, sections 302, 304, 325, 328 and 329 668
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EVIDENCE, *See* Act No. I of 1872, section 30 540
———— *See* Act No. I of 1872, section 32 (5) 510
———— *See* Act (Local) No. II of 1901, section 201 58
———— *See* Act (Local) No. II of 1901, section 201 447
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———— *See* Act No. XV of 1877, schedule II, article 179 385
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———— *See* Act (Local) No. I of 1903, sections 2 and 12 141
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———— *See* Civil Procedure Code, section 244 ... 72
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———— *See* Civil Procedure Code, section 266 ... 252
———— *See* Civil Procedure Code, sections 306, 293 273
———— *See* Civil Procedure Code, sections 310A, 244 and 588 379
———— *See* Civil Procedure Code, section 318 ... 390
———— *Refund of money realized in execution of a decree afterwards reversed in appeal—Limitation—Execution of decree stayed by injunction—Procedure.*] On the 7th October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount Rs. 19,041. The decree was set aside on the 9th July 1904. The suit was retried; and on the 17th September 1904 the Court of first instance made a decree in favour of plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th December 1906. On the 17th September 1907, the respondents applied for a refund of the difference (Rs. 1,804) between the sum realized by the plaintiffs and the sum finally decreed.

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Held (1) that the plaintiffs were at liberty to proceed either by application or by suit—*Shaman Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*, 10 Moo., I. A., 203, *Collector of Meerut* v. *Kalka Prasad*, I. L. R., 28 All., 665, and *Shiam Sundar Lal* v. *Kaisar Zamani Begam*, I. L. R., 29 All., 143, referred to; and (2) that the application was not barred by limitation. *Harish Chandra Shaha* v. *Chandra Mohan Das*, I. L. R., 28 Calc., 113, distinguished.

Bithal Das *v.* Jamna Prasad, I. L. R., 30 All. 476

EXECUTION OF DECREE—*Limitation—Application in continuation of previous proceedings in execution.*] On the 7th December 1903, the sale of certain immovable property, which had been attached, was ordered. On the 30th January 1904, the amin reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder, and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January 1906, the decree-holder again applied, asking that the property, which was still under attachment, might be sold. *Held* that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. *Dukhiram Srimani* v. *Jogendra Chandra Sen*, 5 C. W. N., 347, distinguished. *Rahim Ali Khan* v. *Phul Chand*, I. L. R., 18 All., 482, referred to.

Muajib-ullah *v.* Umed Bibi, I. L. R., 30 All. 499

——— *Sale of ancestral property—Civil Procedure Code, section* 320—*Rules framed by Local Government—Application under Rule* 17 (*XIIIA*).] One of several co-owners of ancestral property which had been sold by the Collector under the Rules framed by the Local Government under section 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending, applied under Rule 17 (XIIIA) to have the sale set aside, making at the same time the necessary payments into Court required by the rule.

Held that upon the presentation of the latter application under Rule 17 (XIIIA) the Collector was bound to set aside the sale, and was in no way precluded from so doing by the existence of the former application under Rule 17 (XII). *Nêt Lall Sahoo* v. *Sheikh Kareem Bux*, I. L. R., 23 Calc., 686, and *Paresh Nath Singha* v. *Nabogopal Chattopadhya*, I. L. R., 29 Calc., 1, referred to.

Tuhi Ram *v.* Izzat Ali, I. L. R., 30 All. 192

EXPROPRIETARY HOLDING, *See* Act (Local) No. II of 1901, section 32 90

GIFT, *See* Hindu law 84

——*See* Muhammadan law 250, 309

GRIEVOUS HURT, *See* Act No. XLV of 1860, sections 302, 304, 325, 328 and 329 568

GUARDIAN, *See* Lunatic... 462

——— AD LITEM—*Appeal—Guardian* ad litem *not made a party by appellant—Limitation.*] Where a guardian *ad litem* of a defendant respondent was not made a party to an appeal filed by the plaintiff until after the period of limitation for filing such appeal had expired, it was *held* that the appeal was not for this reason time-barred. *Khem Karan* v. *Har Dayal*, I. L. R., 4 All., 37, followed.

Rup Chand *v.* Dasodha, I. L. R., 30 All. 55

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GUARDIAN AD LITEM, *See* Guardian and minor 105

GUARDIAN AND MINOR—*Guardian* ad litem—*Civil Procedure Code, section 447—Necessity of formal discharge from the duties of guardian* ad litem—*Suit to set aside a decree.*] *Held* that no suit will lie to set aside a decree where fraud is neither alleged nor proved and no specific relief is asked for save and except the setting aside of the decree. *Umrao Singh* v. *Hardeo*, I. L. R., 29 All., 418, referred to.

Held also that where the same person is both certificated guardian and guardian *ad litem* to minor plaintiffs, the fact that one of such plaintiffs has come of age and been appointed certificated guardian of the persons and property of the others would not relieve the original guardian of her duties as guardian *ad litem*: to do this requires a special order under section 447 of the Code of Civil Procedure.

Banarsi Prasad *v.* Ram Narain, I. L. R., 30 All. ... 105

——————— *See* Act No. XV of 1877, section 19 ... 422

——————— *See* Act No. VIII of 1890 137

——————— *See* Act No. VIII of 1890, sections 29 and 31 188

HINDU LAW—*Adoption—Jains—Custom—Adoption of married man—Suit for declaration of invalidity of adoption—Burden of proof.*] *Held* that according to the law and custom prevailing amongst the Jain community a widow has power to adopt a son to her deceased husband without any special authority to that effect, and if there are two widows the senior widow may adopt without the concurrence of the junior widow. A widow is also competent, with the consent of the *sapindas*, to give a son in adoption after the death of her husband.

Held also that, adoption being amongst the Jains a purely secular institution, there is no legal objection to the adoption of a married man. *Manohar Lal* v. *Banarsi Das*, I. L. R., 29 All., 495 followed. *Chotay Lall* v. *Chunno Lall*, L. R., 6 I. A., 15, *Amava* v. *Mahadgauda*, I. L. R., 22 Bom., 416, *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*, I. L. R., 22 Mad., 398, and *Radha Mohan* v. *Hardai Bibi*, I. L. R., 21 All., 460, referred to.

Held also that where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is still on him to make out a *primâ facie* case that the adoption challenged by him is invalid in law or never took place in fact. *Brojo Kishoree Dassee* v. *Sreenath Bose*, 9 W. R., 463, and *Sardar Singh* v. *Ram Kunwar*, Weekly Notes, 1902, p. 62, followed. *Tacoordeen Tewarry* v. *Ali Hossein Khan*, L. R., 1 I. A., 192, at page 206, referred to. *Tarinee Churn Chowdhry* v. *Sharoda Soonduree Dossee*, 11 W. R., 468, *Chowdhry Pudum Singh* v. *Koer Oddey Singh*, 12 W. R., P. C. R., 1, *Gooroo Prosunno Singh* v. *Nil Madhab Singh*, 21 W. R., 84, and *Har Dyal Nag* v. *Roy Krishto Bhoomick*, 24 W. R., 107, distinguished.

Asharfi Kunwar *v.* Rup Chand, I. L. R., 30 All. ... 197

——————*Gift—Construction of deed of gift—"Malik"- Gift to widow as "malik wa khud ikhtiyar"—"Absolute ownership"—Heritable and alienable estate—No distinction between male and female donee.*] A Hindu executed a deed of gift of immovable property, to take effect after his death, to each of his two wives and his daughter-in-law, "as owners (maliks) with proprietary powers." One of his widows on coming into possession of her share made a will disposing of it in favour of her brother. In a

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suit by the next heirs of the donor questioning her power of alienation.

Held that in the true construction of the deed the widow took a heritable and transferable estate in the property. The use of the word "malik" implies "absolute ownership" unless there is anything in the context or surrounding circumstances to qualify such meaning: and it was not so qualified by the fact that the donee was a widow. In this case the context rather strengthened the presumption that the word was intended to bear its proper technical meaning.

Lalit Mohun Singh Roy v. *Chukkun Lal Roy*, L. R., 24 I. A. 76: I. L. R., 24 Calc., 834, and *Kollany Kooer* v. *Luchmee Pershad* 24 W. R., 395, followed.

Surajmani *v.* Rabi Nath Ojha, I. L. R., 30 All. ... 84

HINDU LAW—*Widow—Power of widow in possession of husband's estates—Alienation of estate made by widow with concurrence of reversioners—Consent at time of alienation—Subsequent ratification—Quantum of consent necessary—Custom excluding daughters from succession, evidence of.*] A Hindu widow in possession of her husband's estate as his heir has power, apart from legal necessity, to alienate the estate, with the concurrence of the reversionary heirs, so as to bind the persons who are the next reversioners when the succession opens out on her death; and this principle has been admitted by all the High Courts in India.

Nobokishore Sarma Roy v. *Hari Nath Sarma Roy*, I. L. R., 10 Calc., 1102, *Marudamuthu Nadan* v. *Srinivasa Pillai*, I. L. R., 21 Mad., 128, *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni*, I. L. R., 25 Bom., 129, and *Ramphal Rai* v. *Tula Kuari*, I. L. R., 6 All., 116, referred to.

The restriction sought to be placed by the Allahabad High Court on the widow's power to surrender in favour, or alienate with the consent, of presumptive reversioners so as to defeat the title of the actual reversioner at the time of the widow's death is at variance with this principle, and not in accordance with the practice in other parts of India in which the Mitakshara law prevails.

Ramphal Rai v. *Tula Kuari*, I. L. R., 6 All., 116, dissented from so far as it supports such restriction.

Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, although there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

It is immaterial whether the concurrence of the reversioners is given at the time the alienation is made or whether the transaction is subsequently ratified. The maxim "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*," referred to.

A custom among the Bhale Sultan tribe of Chhatris in Oudh excluding daughters from succession was held to have been established on the evidence.

Bajrangi Singh *v.* Manokarnika Bakhsh, I. L. R., 30 All. ... 1

———*Hindu widow—Effect of compromise entered into by a Hindu female with a limited estate.*] *Held* that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding on the reversioners, even though it has been followed by a decree of Court; the reversioners can only be bound by a

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decree made after a full contest in a *bonâ fide* litigation. *Gobind Krishna Narain* v. *Khunni Lal*, I. L. R., 29 All., 487, followed.

Mahadei *v.* Baldeo, I. L. R., 30 All.... 75

HINDU LAW—*Hindu widow—Mortgage of husband's estate adversely to adoptive son—Suit to enforce mortgage against adoptive son—Act No. IV of* 1882 (*Transfer of Property Act*), *section* 52—Lis pendens—*Contentious suit—Application for leave to sue* in formâ pauperis—*Civil Procedure Code, section* 410.] A mortgage of part of her late husband's estate was executed by a Hindu widow in defiance of the rights of her husband's adopted son, and in fact in collusion with the mortgagee and in order to deprive the adopted son of his adoptive father's estate. Shortly before this mortgage was executed by the widow the adopted son had applied for leave to sue *in formâ pauperis* for the recovery of his adoptive father's estate. *Held*, on suit by the mortgagees to enforce their mortgage against the adopted son, then in possession, that the suit must fail, both because the fact of the estate having to some slight extent benefited by the money borrowed was not sufficient under the circumstances to make the mortgage enforceable against the adopted son—*Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*, 6 Moo. I. A., 393, distinguished—and also because of the application of the doctrine of *lis pendens*. *Faiyaz Husain Khan* v. *Prag Narain*, I. L. R., 29 All., 339, referred to.

Ambika Partap Singh *v.* Dwarka Prasad, I. L. R., 30 All. ... 95

——————*Hindu widow—Payment by wife of husband's debts during his lifetime—Voluntary payment—Joint Hindu family—Sale of property belonging to one member of a joint family—Separation—Sale set aside—Rights of persons entitled to such property after separation.*] *Held* that the payment by the wife of a separated Hindu of her husband's debts during his lifetime must be considered in the absence of evidence to the contrary as a voluntary payment, and will not support an alienation by the widow after her husband's death of the estate which has descended to her from him.

Held also that the members of a joint Hindu family must be regarded, so far as concerns the dealings of the family with persons outside it, as but one juristic person.

The managing member of a joint Hindu family sold a property exclusively belonging to one member of the joint family, and the proceeds of the sale were brought into the common purse for the benefit of the family.

Held that on the sale of that property being set aside after the separation of that member, he could recover the whole property on payment of the whole purchase money, but that he could not claim to have it by paying only a share of the purchase money proportionate to his share in the joint family property on partition. *Sudarsanam Maistri* v. *Narasimhulu Maistri*, I. L. R., 25 Mad., 149, *Appovier* v. *Rama Subba Aiyan*, 11 Moo., I. A., 75, and *Hasmat Rai* v. *Sunder Das*, I. L. R., 11 Calc., 396, referred to.

Himmat Bahadur *v.* Bhawani Kunwar, I. L. R., 30 All. ... 352

——————*Hindu widow—Money advanced on personal security of widow—Decrees against widow binding only on her widow's estate—Res judicata—Civil Procedure Code, section* 13.] Where money is lent to a Hindu widow on her personal security, a decree for such a debt and a sale of property late of the widow's husband in execution of such decree binds only the widow's estate, notwithstanding that the original debt may have been incurred for legal

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necessity. *Dhiraj Singh* v. *Manga Ram*, Weekly Notes, 189, page 67, followed.

K and S (two brothers) executed a usufructuary mortgage of their respective shares in certain property. The share of S was then purchased in execution of a simple money decree by D. The share of K was after his death brought to sale in execution of a simple money decree against K's widow and purchased by G. G. transferred his rights to R, who was D's brother. D sued for redemption of half the mortgaged property naming as defendants the mortgagee, the heirs of S, and R. Pending this suit R died and D amended his plaint, claiming redemption of the whole. The heirs of S did not defend this suit, which was decided *ex parte* as against them, and the suit was compromised by D's widow. The heirs of S then claiming as next reversioners to K on the death of his widow, brought the present suit, seeking to redeem half of the mortgaged property. *Held* that the suit was not barred by section 13 of the Code of Civil Procedure, inasmuch as the plaintiffs though they might have done so, were not bound in the former suit to raise the defence that D was not entitled to redeem more than half of the mortgaged property.

Kallu *v.* Faiyaz Ali Khan, I. L. R., 30 All. 394

HINDU LAW—*Hindu widow—Widow in possession of husband's estate as inferior proprietor—Effect of enlargement of estate of inferior proprietor by action of Government—Mukaddam.*] An under-proprietor, whose status was described by the term "mukaddam," died, and his estate devolved upon his widow. Whilst this estate was in the possession of the widow, the Government proceeded to make a settlement with the mukaddams, excluding the superior proprietor, to whom an allowance by way of malikana was given. *Held* that the enlarged estate of which the widow thus became possessed was still a Hindu widow's estate merely: the action of Government had not the effect of making her a zamindar with a title independent of that which she derived from her husband. *Keech* v. *Sandford*, 2 W. and T., 7th edn., p. 693, referred to by Stanley, C. J.

Kashi Prasad *v.* Inda Kunwar, I. L. R., All. 30 ... 490

——— *See* Local Act No. II of 1901, section 22 508

———*Joint Hindu family—Mortgage executed in name of minor—Act No. IX of 1872 (Indian Contract Act), section 11—Civil Procedure Code, section 562— "Preliminary point."*] A mortgage in favour of a joint Hindu family is not void because it happens to be executed in the name of a member of the family who at the time of execution is a minor. *Mohori Bibi* v. *Dharmodas Ghose*, I. L. R., 30 Calc., 539, distinguished.

Held also that the decision of an issue as to whether or not the document which formed the basis of the suit was void in consequence of its having been executed in favour of a minor was a decision on a preliminary point, such as justified a remand under section 562 of the Code of Civil Procedure. *Mata Din* v. *Jamna Das*, I. L. R., 27 All. 691, followed.

Meghan Dube *v.* Pran Singh, I. L. R., 30 All. 63

———*Joint Hindu family—Liability of sons for father's debts—Defence that debts were incurred for immoral purposes—Burden of proof.*] According to the Hindu law of the Mitakshara school it is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient, in order to establish the liability of sons to pay a personal debt of his father,

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if the debt be proved, and the sons cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge. *Maharaj Singh* v. *Balwant Singh*, I. L. R., 28 All., 508, distinguished. *Kishan Lal* v. *Garuruddhwaja Prasad Singh*, I. L. R., 21 All., 238, and *Karan Singh* v. *Bhup Singh*, I. L. R., 27 All., 16, followed. *Nanomi Babuasin* v. *Modhun Mohun*, I. L. R., 13 Calc., 21, refered to.

Where in such a case as above, the sons set up the defence that the debt was incurred for immoral purposes, the burden of proof is on them and not on the creditor. *Debi Dat* v. *Jadu Rai*, I. L. R., 24 All., 459, followed. *Jamna* v. *Nain Sukh*, I. L. R., 9 All., 493, dissented from.

And merely general evidence of profligacy on the part of the father is not sufficient. *Chintamanrav Mahendale* v. *Kashinath*, I. L. R., 14 Bom., 320, referred to.

Babu Singh *v.* Bihari Lal, I. L. R., 30 All. 156

HINDU LAW—*Joint Hindu family—Foreclosure of mortgage—Sons not made parties—Sons' right to redeem.*] The mortgagees of a mortgage of joint family property executed by the father alone sued for and obtained a decree for foreclosure. At the time the suit was instituted the mortgagees knew that there were sons and grandsons jointly interested with the mortgagor in the mortgaged property, but, notwithstanding this, they omitted to make them parties to their suit.

Held that the sons and grandsons were not precluded from instituting a suit for redemption. *Bhawani Prasad* v. *Kallu*, I. L. R. 17 All., 537, referred to. *Debi Singh* v. *Jia Ram*, I. L. R., 25 All., 214, distinguished.

Ram Prasad *v.* Man Mohan, I. L. R., 30 All. 256

———*Joint Hindu family—Liability of other members of family for managing member's debts.*] *R. R.*, a member with *G. L.*, his uncle, of a joint Hindu family, got a decree for costs against *G. L.*, and had him arrested in execution thereof. *G. L.*, thereupon borrowed money on a mortgage of joint family property and procured his release. *Held* on suit by the mortgagee for sale of the mortgaged property that the mortgagee could not under the circumstances proceed against *R. R's* interest in the joint family property. *Dalip Singh* v. *Sri Kishen Pande*, N-W. P., H.C. Rep., 1872, p. 83, distinguished.

Ram Ratan *v.* Lachman Das, I. L. R., 30 All. 460

———*Religious endowment—Endowment to take effect after a life estate.*] *Held* that there is no objection to the limitation by a Hindu testator or settlor of a life estate followed by an endowment of property to religious or charitable purposes.

Gobind Prasad *v.* Gomti, I. L. R., 30 All. 288

———*Succession—Impartible estate—Estate devised to widow of owner—Suit by reversioner—Compromise—Estate taken by reversioner.*] The owner of an impartible estate to which the rule of primogeniture applied died leaving a will which purported to give the whole estate absolutely to his widow. After the death of the testator the next reversioner sued to recover the estate and pleaded that the will set up by the widow was invalid. The parties to this suit entered into a compromise, the main provisions of the compromise being that the widow should be the "gaddi-nashin" during her life and should give the plaintiff a monthly allowance, and that after the death of the widow the plaintiff or any representative (*kaem mokam*) who might be living should be the absolute owner of

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all the movable and immovable properties possessed by the testator and should occupy the "gaddi." The plaintiff reversioner predeceased the widow.

Held on suit by the widow of this reversioner to recover the estate as against certain other members of her husband's family who were in possession, that the effect of the compromise was that a vested interest in the estate in the character of an impartible estate was, subject to the life interest of the widow, limited to the plaintiff reversioner and that upon his death the estate descended to his heir according to the rule of primogeniture and not to his widow.

Rani Mewa Kuwar v. *Rani Hulas Kuwar*, L. R.,1 I. A., 157, *Gobind Krishna Narain* v. *Abdul Qayyum*, I. L R., 25 All., 546, *Bachcho Kunwar* v. *Dharam Das*, I. L. R., 28 All., 347, and *Ram Shankar Lal* v. *Ganesh Prasad*, I. L. R., 29 All., 451, referred to. *Abdul Wahid Khan* v. *Nuran Bibi*, I. L. R., 11 Calc., 597, distinguished.

Harpal Singh *v.* Lekhraj Kunwar, I. L. R., 30 All. ... 406

HINDU WIDOW, *See* Hindu law 1, 75, 95, 352, 394, 490
IMPARTIBLE ESTATE, *See* Hindu law 406
INTENTION, *See* Act No. XLV of 1860, sections 28, 231 93
INTEREST, *See* Act No. VIII of 1890, sections 29 and 31 188
INTERPLEADER SUIT, *See* Civil Procedure Code, sections 473 (*c*), 588 (23) 22
IRREGULARITY, *See* Criminal Procedure Code, sections 145, 435 and 537 41
JAINS, *See* Hindu Law 197
JOINT DECREE, *See* Act (Local) No. I of 1903, sections 2 and 12 ... 141
JOINT HINDU FAMILY, *See* Hindu law ... 63, 156, 256, 352, 460
JUDGMENT, *See* Civil Procedure Code, sections 574 and 551 ... 319
JURISDICTION, *See* Act No. XII of 1896, section 44(2), 48 and 57 ... 377
——————— *See* Act (Local) No. II of 1901, section 177 ... 133
——————— *See* Act (Local) No. II of 1901, sections 177, 199, 200 25
——————— *See* Civil Procedure Code, sections 16 and 19 ... 560
JURY, *See* Criminal Procedure Code, sections 133 *et seqq.* ... 364

LAMBARDAR AND CO-SHARER—*Powers of lambardar to deal with coparcenary lands—Lease for seven years.*] In the absence of a custom to the contrary a lambardar has no power without the consent of the co-sharers, to grant a lease of coparcenary land beyond such term as the circumstances of the particular year or season may require. *Chattray* v. *Nawala*, I. L. R., 29 All., 20, followed. *Mukhta Prasad* v. *Kamta Singh*, Weekly Notes, 1906, p. 277, distinguished.

Tikam Singh *v.* Khubi Ram, I. L. R., 30 All. 163

LAND-HOLDER AND TENANT—*Partition—Rights of tenants in respect of house sites in the abadi.*] As the result of the partition of a village hitherto forming one mahal into two mahals the occupancy holding of a tenant fell into one mahal owned by one co-sharer, whilst a house which the tenant and his predecessors in title had occupied for a considerable period as appurtenant to the agricultural holding fell into the other mahal owned by the other co-sharer. *Held* that the partition effected no change in the position of the tenant: so long as he continued in possession of his occupancy holding he could not be ejected from his house in the

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abadi of the village, nor could he be required to pay rent therefor. *Dharam Singh* v. *Bhoolar*, Weekly Notes, 1908, p. 123, followed. *Sundar Lal* v. *Chajju*, Weekly Notes, 1901, p. 42, distinguished. *Panna* v. *Nazir Husain*, Weekly Notes, 1902, p. 60, doubted.

Saddu *v.* Bihari Singh, I. L. R., 30 All. 282

LAND-HOLDER AND TENANT—*Trees—Land-holder's and tenant's rights as to trees on tenant's holding.*] *Held* that as a general rule the property in timber growing on a tenant's holding vests in the zamindar, and the tenant has no right to cut and remove such timber. But as a general rule also the zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding so long as the relation of landlord and tenant subsists. *Sheikh Abdool Rohoman* v. *Dataram Bashee*, Weekly Reporter, January to July 1864, page 367, referred to.

Ganga Dei *v.* Badam, I. L.R., 30 All. 134

——————*Concurrent leases—Landlord entitled to recover rent only as against second lessee.*] *Held* that where a lessor executes two concurrent leases of the same property, that is to say, two leases in which the term of the second commences before the term of the first has expired, the second lessee is to be taken as the assignee of the lessor's interest during the concurrent portion of the terms, and the lessor after the execution of the second lease can recover rent only from the second and not from the first lessee. *Harmer* v. *Bean*, 3 C., and K. 307, followed.

Ram Anant Singh *v.* Shankar Singh, I. L. R., 30 All. ... 369

LEASE—*Condition for payment of rent in advance—Suit by purchaser of demised property for rent—Registration—Notice.*] Certain property was leased for a term of 10 years, the lease containing a provision to the effect that if at any time during the currency of the lease the lessor should demand any portion of the rent in advance from the lessee, the latter should be bound to pay it on obtaining a receipt. Subsequently to the execution of this lease the demised property was sold by auction in execution of a decree. The auction purchaser sued the lessee for rent, but was met by the plea that the rent claimed had been paid to the lessor in advance under the terms of the lease. The lease was registered and it was found that the auction purchaser had not made inquiry of either the lessor or the lessee as to whether or not any rent had been paid in advance according to the terms of the lease. *Held* that under these circumstances the plaintiff was not entitled to recover.

Nand Kishore *v.* Anwar Husain, I. L. R., 30 All. ... 82

LEASE, *See* Lambardar and co-sharer 163

——————, *See* Landlord and tenant 369

LIMITATION, *See* Act No. XV of 1877, section 19 422

——————*See* Act No. XV of 1877, schedule II, article 75 ... 123

——————*See* Act No. XV of 1877, schedule II, article 91 ... 375

——————*See* Act No. XV of 1877, schedule II, articles 111 and 123 172

——————*See* Act No. XV of 1877, schedule II, article 116 400, 402

——————*See* Act No. XV of 1877, schedule II, article 179 ... 385

——————*See* Act No. XV of 1877, schedule II, article 179 (4) ... 179

——————*See* Act No. IV of 1882, section 90 388

——————*See* Act (Local) No. II of 1901, section 199 (*a*) ... 44

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LIMITATION *See* Civil Procedure Code, section 248 536
——— *See* Civil Procedure Code, section 318 390
——— *See* Execution of decree 476
——— *See* Execution of decree 499
——— *See* Guardian *ad litem* 55
LIS PENDENS, *See* Civil Procedure Code, section 244 231
——— *See* Hindu law 95
——— *See* Pre-emption 467

LUNATIC—*Muhammadan law—Guardian de facto—Sale of lunatic's property by mother and wife for benefit of lunatic.*] The mother and wife of a lunatic Muhammadan, acting *de facto* as the guardians of the lunatic, sold certain property belonging to the lunatic in order to discharge debts due by him. *Held* that the transaction could not be impeached, although the mother was not under the Muhammadan law the legal guardian of the lunatic. *Mafazzal Hosain* v. *Basid Sheikh*, I. L. R., 24 Calc., *Ram Charan Sanyal* v. *Anukul Chandra Acharjya*, I. L R., 34 Calc., 65, and *Majidan* v. *Ram Narain*, I. L. R., 26 All., 22, followed.

Ummi Begam *v.* Kesho Das, I. L. R., 30 All. ... 462

MALICIOUS PROSECUTION—*Information given to police—Prosecution by police after investigation—Acquittal of accused—Liability of informant where information is found to be false—"Prosecutor" in criminal case—Malice—Criminal Procedure Code, section* 495.] It is not a principle of universal application that if the police or Magistracy act on information given by a pravate individual without a formal complaint or application for process the Crown and not the individual becomes the prosecutor.

Narasinga Row v. *Muthaya Pillai*, I. L. R., 26 Mad., 362, distinguished.

The answer to the question who is the "prosecutor" must depend upon the whole circumstances of the case. The mere setting the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted by the police; that is again a question of fact. Theoretically all prosecutions are conducted in the name and in behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who, *pro hac vice*, represents the Crown. In India under section 495 of the Criminal Procedure Code (Act V of 1898) a private person may be allowed to conduct a prosecution, and "any person conducting it may do so personally or by pleader"; and where it is permitted this is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives.

The foundation of the action for malicious prosecution is malice, which may be shown at any time in the course of the inquiry.

Fitzjohn v. *Mackinder*, 9 C. B., N. S., 505, referred to.

Where the defendants, though their names did not appear on the face of the proceedings, except as witnesses, were directly responsible for a charge of rioting being made against the plaintiff, had produced false witnesses to support the charge at the investigation by the police; had taken the principal part in the conduct of the case before the police and in the Magistrate's Court; had instructed the counsel who appeared for the prosecution at the trial that the plaintiff "had joined the riot," and had

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done all they could to procure the conviction of the plaintiff, who was acquitted, being found not to have been present at the rioting.

Held that they were rightly found liable for damages in an action for malicious prosecution.

Gaya Prasad *v.* Bhagat Singh, I. L. R., 30 All. ... 525

MAXIM, *Qui prior est tempore potior est jure, See* Act No. IV of 1882, section 53 297

MINOR, *See* Hindu law 63

MISJOINDER OF CHARGES, *See* Criminal Procedure Code, sections 234 and 235 351

"MONEY," *See* Will 455

MORTGAGE—*Usufructuary mortgage—Ouster of mortgagees—Adverse possession.*] One of the purchasers of the equity of redemption in a usufructuary mortgage ousted the mortgagees and took possession of the entire mortgaged property which he retained for more than twelve years; but it was found that he never denied the mortgagors' title, and that the mortgagors had no right to present possession. *Held*, that there was no adverse possession as against the other mortgagors, although there was as against the mortgagees, and that the right of redemption was not lost: the ouster of the mortgagees did not entitle the plaintiff to re-enter into possession. *Muhammad Husain* v. *Mul Chand*, I. L. R., 27 All., 395, *Chinto* v. *Janki*, I. L. R., 18 Bom., 51, *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee*, I. L. R., 4 Calc., 327, and *Vithoba* v. *Gangaram*, 12 Bom., H. C. Rep., 180, referred to.

Ismdar Khan *v.* Ahmad Husain, I. L. R., 30 All. ... 119

MORTGAGE, *See* Act No. III of 1877, section 50 238

——— *See* Act No. XV of 1877, schedule II, article 116 400, 402

——— *See* Act No. IV of 1882, section 53 297

——— *See* Act No. IV of 1882, section 68 (*c*) 162

——— *See* Act No. IV of 1882, section 85 240

——— *See* Act No. IV of 1882, sections 88 and 89 248

——— *See* Act No. IV of 1882, section 90 388

——— *See* Act No. IV of 1882, section 91 ... 488, 497

——— *See* Act No. IV of 1882, sections 92 and 94 36

——— *See* Act No. IV of 1882, section 99 146

——— *See* Act No. XVI of 1882, sections 8 and 28 38

——— *See* Benamidar 30

——— *See* Civil Procedure Code, section 266 252

——— *See* Hindu Law 256

——— *See* Pre-emption 130

——— Usufructuary—, *See* Civil Procedure Code, section 43 ... 225

MUHAMMADAN LAW—*Gift—Hiba bil mushaa—Possession.*] *Held* that what is known to Muhammadan law as a *hiba bil mushaa*, or gift of an undivided joint property, is a valid gift if the donee obtains possession. *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*, I. L. R., 11 All., 460, referred to.

Mohib-ullah *v.* Abdul Khalik, I. L. R., 30 All. 250

——— *Gift—Usufruct—Ariat.* *Held* upon application for review of judgment in the case of *Mumtaz-un-nissa* v. *Tufail Ahmad*, I. L. R., 28 All., 264; Weekly Notes, 1905, p.

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269; that what was decided in that case was that the transfer there in question was not an absolute gift, so that any limitation or condition limiting it would be void under the Muhammadan law, but that, taking the transaction as a whole, it was a grant of the usufruct of the property to Musammat Habib-un-nissa for her life. It was not intended to be laid down that the transfer being an *ariat* was invalid.

Khalil Ahmad. In the matter of the petition of—I. L. R., 30 All. 309

MUHAMMADAN LAW—*Shias—Will—Power of devise amongst Shias.*] Amongst Muhammadans of the Shia sect a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and such a legacy will be valid without the consent of the other heirs. Where, however, the legacy exceeds one-third of the estate it will not be valid to any extent unless the consent of the heirs, given after and not before the death of the testator, has been obtained. *Cherachom Vittil Ayisha Kutti Umah* v. *Valia Pudiakel Biathu Umah*, 2 Mad., H. C. Rep., 350, *Keramatulnissah Bibee*, 2 Morley's Digest, 120, and *Ranee Khujooroonissa* v. *Roushun Jehan*, L. R., 3 I. A., 291, referred to.

Fahmida Khanum *v.* Jafri Khanum, I. L. R., 30 All. ... 153

——— *See* Lunatic 462

——— *See* Pre-emption 372

MUKADDAM, *See* Hindu law 490

MUKHTAR, *See* Criminal Procedure Code, section 4 (*r*) 66

MULTIFARIOUSNESS, *See* Civil Procedure Code, sections 16 and 19... 560

MURDER, *See* Act No. XLV of 1860, sections 302, 304, 325, 328 and 329 568

NOTICE, *See* Act No. XLV of 1860, sections 182, 211 52

——— *See* Act No. III of 1877, section 50 238

——— *See* Lease 82

OCCUPANCY HOLDING. *See* Act (Local) No. II of 1901, section 22, 128, 508

OFFICIAL ASSIGNEE, *See* Civil Procedure Code, section 244 ... 486

PARTIES, *See* Act No. IV of 1882, section 85 240

——— *See* Appeal 48

——— *See* Civil Procedure Code, section 362 117

———. Misjoinder of—, *See* Civil Procedure Code, sections 16 and 19 560

——— Non-joinder of—, *See* Civil Procedure Code, section 34 ... 538

——— *See* Civil Procedure Code, section 365 49

PARTITION, *See* Act No. IV of 1893, section 4 324

——— *See* Land-holder and tenant 282

PARTNERSHIP, *See* Civil Procedure Code, sections 43, 373 ... 279

PAWNOR AND PAWNEE, *See* Act No. IX of 1872, section 178 ... 165

PEDIGREE, *See* Act No. I of 1872, section 32(5) 510

POSSESSION, *See* Muhammadan Law 250

PRACTICE, *See* Civil Procedure Code, section 503 393

See Criminal Procedure Code, section 439 116

——— *See* Custom 311

See Privy Council 258

——— *See* Procedure 367

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PRE-EMPTION—*Mortgage—Property purchased by vendees subject to an unregistered mortgage—Pre-emptors bound to take the property subject to the mortgage.*] Property the subject of a suit for pre-emption was purchased by the vendees subject to an unregistered mortgage for Rs. 99. *Held* that the pre-emptor must take the property subject to this unregistered mortgage irrespective of the question whether he had notice of it or not.

Tejpal *v.* Girdhari Lal, I. L. R., 30 All. 180

——————*Wajib-ul-arz—Construction of document—"Shurkayan-i-shikmi."*] The wajib-ul-arz of a village (Kandhla) in the Muzaffarnagar district gave a right of pre-emption, first to *shikmi* co-sharer (*Shurkayan-i-shikmi*), secondly, to share-holders descended from a common ancestor (*Shurkayan-i-jaddi*), and thirdly, to *khewatdars* in the mahal (*Khewatdaran-i-mahal*). The mahal was divided into seven *patties* and the land in dispute was situated in *patti* Khail, *thok* Bhuria. The pre-emptors were co-sharers in *patti* Khail. One of the vendees was a co-sharer in the mahal, but not in *patti* Khail. *Held* that, regarding the whole context of the wajib-ul-arz, the expression *shurkayan-i-shikmi* was intended to denote relatives by blood and not co-sharers in any subdivision of the mahal, and the plaintiffs were not therefore entitled to pre-emption.

Bahal Singh *v.* Mubarik-un-nissa, I. L. R., 30 All. ... 77

——————*Sale to a co-sharer after institution of a suit for pre-emption—Act No. IV of* 1882 *(Transfer of Property Act), section* 52—*Lis pendens.*] After the filing of a suit for pre-emption but before service of summons on the defendants, the defendant vendee re-sold the property claimed to a second vendee who had equal rights as a co-sharer with the plaintiff. This second vendee was added by the Court as a party defendant, but the plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. *Held* that the doctrine of *lis pendens* applied, and the plaintiff was entitled to a decree. *Faiyaz Husain Khan* v. *Prag Narain*, I. L. R., 29 All., 339, referred to. *Manpal* v. *Sahib Ram* I. L. R., 27 All., 544, distinguished.

Ghasitey *v.* Gobind Das, I. L. R., 30 All. 467

——————*Wajib-ul-arz—Co-sharer—Owner of resumed muafi land.*] The pre-emptive clause of a wajib-ul-arz contained the following provision :—*Minjumla malikon-ke agar koi hissadar apni haqqiat bai karne chahe to awwal dusre hissadar sharik haqqiat-ki hath bai karega.*" *Held* that the owner of resumed muafi land (which had been resumed before this wajib-ul-arz was framed) in the same khewat as the land sold was entitled to pre-emption as against a vendee who was merely a co-sharer in a different khewat. *Lalta Prasad* v. *Lalta Prasad*, Weekly Notes, 1881, page 165, referred to.

Narain Prasad *v.* Munna Lal, I. L. R., 30 All. ... 239

——————*Wajib-ul-arz—Construction of document—Muhammadan law.*] The pre-emptive clauses of a wajib-ul-arz contained the following provision :—"The zamindar of the *khalsa* is one person; hence there is no custom of pre-emption in the *khalsa*; but among the owners of the *khalsa* and *milks* the following custom of pre-emption obtains." The *khalsa* subsequently came to have more owners than one. *Held* that no right of pre-emption was given by this wajib-ul-arz to the owners of the *khalsa inter se*, but that a sale of a share in the *khalsa* was subject to the Muhammadan law of pre-emption, and this irrespective of the

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fact that the vendee was a Hindu. *Gobind Dayal* v. *Inayatullah*, I. L. R., 7 All., 775, *Qurban Husain* v. *Chote*, I. L. R., 22 All., 102, and *Amir Hasan* v. *Rahim Bakhsh*, I. L. R., 19 All., 466, referred to.

Ram Lal *v.* Bahadur Ali, I. L. R., 30 All. 372

PRE-EMPTION—*Wajib-ul-arz—Construction of document—Custom or contract.*] The wajib-ul-arz of a village in the Saharanpur district of the year 1867 contained the following agreement on the part of the "khewatdars" of the village that "up to the term of the settlement and in future to the termination of the next settlement they will abide by the following terms and act upon them." Amongst the subsequent provisions were certain relating to the right of pre-emption. In a later wajib-ul-arz of 1890 no mention was made of any custom of pre-emption, but it contained these words :—For the remaining village customs see the wajib-ul-arz prepared in 1867."

Held that the wajib-ul-arz of 1867 recorded a contract and not a custom, and that the rights conferred by it would not be perpetuated by the incorporation in the later wajib-ul-arz of the customs existing in the village.

Budh Singh *v.* Gopal Rai, I. L. R., 30 All. ... 544

PRESUMPTION, *See* Act (Local) No. II of 1901, section 201 ... 58

——————————section 201 ... 447

PRIVY COUNCIL—PRACTICE OF — *Courts in India differing as to question of fact—Question as to a mortgage being a real or fictitious transaction—Circumstances to be taken into consideration in dealing with conflicting evidence.* On the question whether a mortgage was fictitious or a real transaction there was evidence on each side bearing directly on the character of the transaction but on neither side was the evidence wholly convincing. Persons whom one might have expected to be prominent witnesses were not called, and the evidence given by those who were called was open to much adverse criticism. The Courts in India differed, the Subordinate Judge deciding that the mortgage was fictitious, and the High Court holding it to be a genuine transaction. *Held* by the Judicial Committee that in determining which story was to be accepted it was necessary for their Lordships to rely largely upon surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions ; and their subsequent conduct ; and so dealing with the case their Lordships upheld the decision of the High Court. The fact that if a genuine transaction it was advantageous to the mortgagor, and if fictitious it afforded him no immediate protection from creditors (which was the motive alleged by the defendants for entering into the transaction) was a very material circumstance in the case.

Dalip Singh v. Nawal Kunwar, I. L. R., 30 All. ... 258

PROCEDURE—*Refusal of Court of first instance to examine all the plaintiff's witnesses—Appeal by defendant decreed—Remand.*] Owing to the direction of the Court of first instance only a portion of the evidence available in support of the plaintiff's case was recorded by that Court, which decreed the plaintiff's suit. On appeal, however, the lower appellate Court took a different view of the plaintiff's evidence and dismissed the suit. *Held* that the plaintiff should be given an opportunity of producing the evidence which had not been recorded owing to the attitude taken up by the Court of first instance. *Kifayat-ullah Mondol* v.

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Sakina Bibi, 11 C. W. N., p. xcii, and *Kalyani Prasad* v. *Bishnath*, Weekly Notes, 1905, p. 266, referred to.

Pabitra Kunwar *v.* The Maharaja of Benares, I. L. R., 30 All. 367

PROCEDURE—*Relief granted which was not asked for by the plaintiffs—Appeal—Court fee.*] The plaintiffs in a suit for sale on a mortgage were granted by the first Court a relief for which they had not asked and which could not properly have been granted to them without an amendment of the plaint. On appeal by one of the defendants the appellant was made to pay an additional court fee corresponding to the relief granted to the plaintiffs. The plaintiffs respondents were also required to make good the deficiency in the court fee paid in the first Court. This the plaintiffs declined to do unless the decree was confirmed in its entirety. *Held*, that the plaintiffs were not entitled to retain the full benefit of the first Court's decree nor liable to pay the additional court fee; and the appellant might on application to the proper authority obtain a refund of the excess court fee which he had been erroneously compelled to pay.

Indar Sen Singh *v.* Rikhai Singh, I. L. R., 30 All. ... 103

——— *See* Act No. III of 1867, sections 5 and 6 60

——— *See* Act No. XLV of 1860, sections 182, 211 ... 52

——— *See* Appeal 48

——— *See* Civil Procedure Code, sections 574 and 551 ... 319

——— *See* Civil Procedure Code, section 578 136

——— *See* Criminal Procedure Code, section 133 *et seqq* ... 364

——— *See* Criminal Procedure Code, sections 145, 435 and 537 41

——— *See* Execution of decree 476

"PROSECUTOR", *See* Malicious prosecution 525

PUBLIC NUISANCE—*Killing of cows by Muhammadans—Custom.*] Under certain limitations the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in so doing he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. The right of Muhammadans to slaughter kine is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with. *Muttumira* v. *Queen-Empress*, I. L. R., 7 Mad., 590, *Queen-Empress* v. *Byramji Edalji*, I. L. R., 12 Bom., 437, *Queen-Empress* v. *Zaki-ud-din*, I. L. R., 10 All., 44, *Queen-Empress* v. *Imam Ali*, I. L. R., 10 All., 150, *Romesh Chunder Sanyal* v. *Hiru Mondal*, I. L. R., 17 Calc., 852, and *Hadjee Muzhur Ali* v. *Gundowree Sahu*, 25 W. R., Cr. R., 72, referred to.

Shahbaz Khan *v.* Umrao Puri, I. L. R., 30 All. ... 181

RECEIVER, *See* Civil Procedure Code, section 503 393

REDEMPTION, *See* Act No. IV of 1882, section 91 ... 488, 497

——— *See* Act No. IV of 1882, sections 92 and 94 ... 36

——— *See* Benamidar 30

REGISTRATION, *See* Lease 82

RELIGIOUS ENDOWMENT—*Trust—Uncertainty—Income of villages to be applied to "charitable purposes" at a dharamshala which the settlor had founded.*] By a deed of trust or *bhentnama*, the owner of seven villages settled the income thereof to the extent of Rs. 500 a

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month to be applied to "charitable purposes" at a dharamsala which he had founded. In course of time one of the villages mentioned in the deed of trust was alienated by a person who was at the time acting as trustee. *Held*, on suit by the trustees to have the sale cancelled and to recover possession of the village, (1) that the trust was not void for uncertainty, and (2) that it was not competent to the court in the suit as framed to declare that the village in suit was charged with a proportionate part of the total income of the seven endowed villages. *Ranchordas Vandravandas* v. *Parvatibai*, I. L. R., 23 Bom., 725, referred to.

Gordhan Das *v.* Chunni Lal, I. L. R., 30 All. 111

RELIGIOUS ENDOWMENT *See* Hindu law 288

REMAND, *See* Civil Procedure Code, section 562 191

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RES JUDICATA, *See* Civil Procedure Code, section 13 470

——— *See* Hindu law 394

REVISION, *See* Criminal Procedure Code, section 145 331

——— *See* Criminal Procedure Code, sections 145, 435 and 537 ... 41

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——— *See* Criminal Procedure Code, section 439 116

SALE, *See* Act No. XV of 1877, schedule II, article 116 402

——— *See* Act No. IV of 1882, section 54 125

SANCTION TO PROSECUTE, *See* Criminal Procedure Code, section 195 109

——— *See* Criminal Procedure Code, sections 195, 439 243

SECOND APPEAL, *See* Custom 311

SECURITY FOR COSTS, *See* Civil Procedure Code, section 549 ... 143

SECURITY FOR GOOD BEHAVIOUR, *See* Criminal Procedure Code, sections 110 and 526... 47

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"SENTENCE," *See* Criminal Procedure Code, sections 123 and 397 ... 334

SHIAS, *See* Muhammadan law 153

STAMP, *See* Act No. II of 1899, sections 40, 44, 48 and 55 ... 271

"STREET," *See* Act (Local) No. I of 1900, section 3 (4) 70

SUCCESSION, *See* Act (Local) No. II of 1901, section 22 ... 128, 508

——— *See* Hindu law 406

SUIT for cancellation of a deed, *See* Act No. XV of 1877, Schedule II, article 91 375

——— for compensation for the breach of a contract in writing registered, *See* Act No. XV of 1877, schedule II, article 116 400, 402

——— for redemption of mortgage, *See* Act No. VII of 1870, section 7, IX; schedule I, article 1 547

SUNDAY, *See* Civil Procedure Code, section 578 136

TRANSFER, *See* Criminal Procedure Code, sections 110 and 526 ... 47

TREES, *See* Land-holder and tenant 134

TRUST, *See* Religious endowment 111

WAJIB-UL-ARZ—*Construction of document—House-tax—Cess—Rent.*] Under the wajib-ul-arz of a village called Radhakund the zamindar

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was declared to be entitled to one *taka* (six pies) per month for every house from the occupants of the village and also from the owners of shops and temples. *Held* that this payment (which was called "gharghanna") was not a house-tax, or cess, but merely ground-rent and did not require special sanction.

Balwant Singh *v.* Shankar, I. L. R., 30 All. 235

WAJIB-UL-ARZ *See* Pre-emption 77, 329, 372, 544

WARRANT, *See* Act No. III of 1867, sections 5 and 6 60

WILL—*Construction of document—"Money"—General personal estate.*] Where a testator after clearly indicating an intention to exclude entirely certain of his relations from succession to his property, proceeded to bequeathe his "money" to two legatees, with directions as to its disposal, it was *held* that the intention of the testator being apparently, from a perusal of the whole will, to bequeathe all his personal property to the legatees, it was not necessary to construe the term used in its strict limited signification, but the whole of the testator's personal estate passed. *Cadogan* v. *Palagi*, L. R., 25 Ch. D., 154, referred to.

Cheda Lal *v.* Gobind Ram, I. L. R., 30 All.... ... 455

——, *See* Muhammadan law 153

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P.C.
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February 8, 13, 14,
October 31.

BAJRANGI SINGH AND ANOTHER (PLAINTIFFS) *v.* MANOKARNIKA BAKHSH SINGH (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow.]

Hindu law—Widow—Power of widow in possession of husband's estate—Alienation of estate made by widow with concurrence of reversioners—Consent at time of alienation—Subsequent ratification—Quantum of consent necessary—Custom excluding daughters from succession, evidence of.

A Hindu widow in possession of her husband's estate as his heir has power, apart from legal necessity, to alienate the estate, with the concurrence of the reversionary heirs, so as to bind the persons who are the next reversioners when the succession opens out on her death; and this principle has been admitted by all the High Courts in India.

Nobokishore Sarma Roy v. *Hari Nath Sarma Roy* (1), *Marudamuthu Nadan* v. *Srinivasa Pillai* (2), *Vinak Vithal Bhange* v. *Govind Venkatesh Kulkarni* (3) and *Ramphal Rai* v. *Tula Kuari* (4) referred to.

The restriction sought to be placed by the Allahabad High Court on the widow's power to surrender in favour, or alienate with the consent, of presumptive reversioners so as to defeat the title of the actual reversioner at the time of the widow's death, is at variance with this principle, and not in accordance with the practice in other parts of India in which the Mitakshara law prevails.

Ramphal Rai v. *Tula Kuari* (4) dissented from so far as it supports such restriction.

Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, although there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

It is immaterial whether the concurrence of the reversioners is given at the time the alienation is made or whether the transaction is subsequently ratified. The maxim "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur,*" referred to.

Present:—Lord MACNAGHTEN, Lord DAVEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

(1) (1884) I. L. R., 10 Calc., 1102.
(2) (1898) I. L. R., 21 Mad., 123.
(3) (1900) I. L. R., 25 Bom., 129.
(4) (1883) I. L. R., 6 All., 116.

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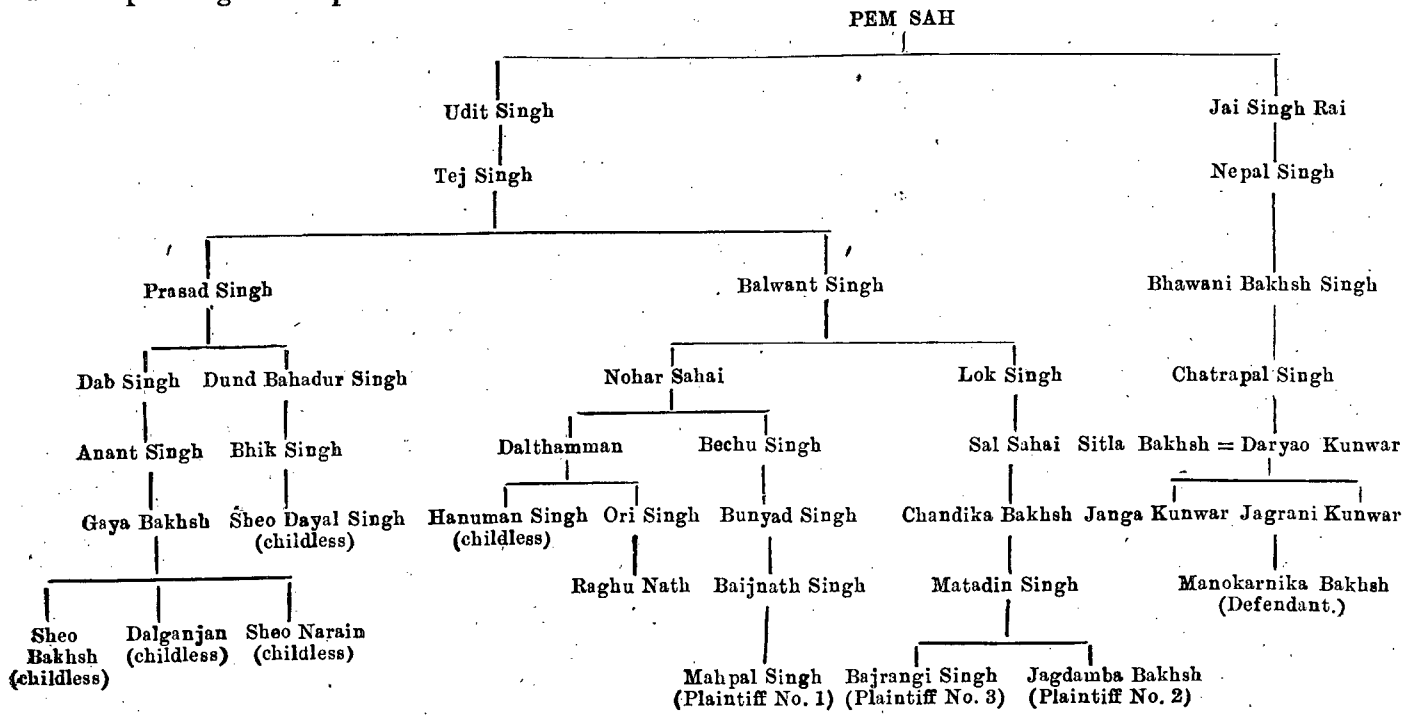
A custom among the Bhale Sultan tribe of Chhattris in Oudh excluding daughters from succession was held to have been established on the evidence.

APPEAL from a judgment and decree (March 6th 1900) of the Court of the Judicial Commissioners of Oudh, which affirmed a decree (January 23rd, 1899) of the Court of the District Judge of Rae Bareli dismissing the appellants' suit with costs.

The property in suit was an estate comprising certain villages situate in the District of Sultanpur. The appellants claimed to recover possession of the estate as the next heirs of one Sitla Bakhsh, who died prior to the annexation of Oudh leaving a widow Daryao Kunwar, and two daughters Janga Kunwar nd Jagrani Kunwar. On his death Daryao Kunwar succeeded to possession of the estate, and died on 6th August 1892: and the main question raised on this appeal was whether the appellants on her death became entitled to the immediate possession of the estate to the exclusion of the daughters and their issue. The respondent was the son of Jagrani Kunwar who married one Maheshar Bakhsh Singh.

During her lifetime Daryao Kunwar had made alienations of portions of the estate. On 21st October 1872 she sold the village of Surpur to Maheshar Bakhsh for Rs. 1,000; and on the same date she sold the villages of Miserpur and Mansahpur to the same person for Rs. 900 and Rs. 1,000 respectively. On 24th of July 1875 she sold the remaining portion of the estate to Maheshar Bakhsh for Rs. 9,000; and in pursuance of these deeds of sale the purchaser was on the death of Daryao Kunwar put into possession of the property and his name duly recorded in the revenue registers.

The following pedigree is material to explain the litigation which arose on the execution of the deeds of sale, and the pleadings in the present case.



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IN 1873 Matadin Singh the father of the appellants brought a suit against Daryao Kunwar for a declaration that the sale-deeds dated 21st October 1872 ought to be cancelled and set aside. That suit was eventually dismissed by the Court of the Judicial Commissioners on 6th May 1874. A suit of a similar nature instituted by Ganga Kunwar one of the daughters of Sitla Bakhsh was also dismissed on 25th August 1876.

Subsequently on 4th May 1877 some of the possible reversioners to the estate, including Baijnath Singh the father of Mahpal Singh, executed a deed by which they expressly ratified and confirmed the deeds of sale executed by Daryao Kunwar, and on 29th January 1878 a similar deed was executed by Janga Kunwar and by Matadin Singh the father of the appellants.

No dispute arose on the death of Daryao Kunwar, but after the death of Maheshar Bakhsh Singh on 23rd April 1893 disputes arose as to possession and the alteration of names in the revenue register. The Deputy Commissioner of Sultanpur by an order of 28th June 1893, directed the name of the respondent, Manokarnika Bakhsh Singh to be entered in the revenue records, and placed him in possession of the property in dispute: whereupon Mahpal Singh and Jagdamba Bakhsh Singh, on 17th February 1894 instituted the suit out of which the present appeal arose. By order dated 30th July 1895 Bajrangi Singh was added as a plaintiff and, Mahpal Singh having died pendente lite, the suit was continued by Jagdamba Bakhsh and Bajrangi Singh who were substituted on the record as representatives of Mahpal Singh.

The plaint, after stating the facts as above, alleged that the plaintiffs were the next heirs of Sitla Bakhsh Singh on the death of Daryao Kunwar; and it was pleaded that the deeds of sale executed by Daryao Kunwar in favour of Maheshar Bakhsh Singh were not under the circumstances binding on the reversioners, and that daughters and their issue were excluded from the succession by the custom of the Bhale Sultan tribe of Chhattris to which the parties belonged. The property claimed was not only the villages in dispute, but also certain movable property, and the relief sought was possession of the immovable and movable property with mesne profits and costs.

The defence was that the plaintiffs were not the next heirs to the estate; that the succession was governed by the ordinary Hindu Law and not by custom; that Daryao Kunwar took on her husband's death an absolute estate in all the property in suit; that the deeds of sale executed by her were binding on the plaintiffs, not only because of the circumstances under which they were executed, but also in consequence of the affirmance of the said deeds by the deeds executed by Baijnath Singh and Matadin Singh on 4th May 1877 and 29th January 1878, and that the suit was barred by limitation. As to the movable property the defendant set up a title under a will executed by Daryao Kunwar on 18th November 1887.

Issues were framed on which the District Judge in a preliminary judgment held that the suit was not barred by the deeds executed by Baijnath Singh and Matadin Singh on 4th May 1877 and 29th January 1878. The questions raised on the other issues so far as they are now material were (1) whether the suit was barred by limitation, and as to that the District Judge held that it was not; (2) whether the plaintiffs were the next reversioners; (3) whether a custom excluding daughters and their issue from inheriting had been proved, and (4) whether the sale deeds executed by Daryao Kunwar were binding on the plaintiffs.

As to the custom, after referring to the origin and derivation of the name of the Bhale Sultan tribe of Chhattris and the districts in which they were mostly located, for which the Sultanpur Settlement Report, 1873, page 179, paras. 367, 368 and 370, and the Gazetteer of Oudh, Ed. 1877, Vol. II, pages 91 and 92 were cited, the District Judge said :—

"The plaintiffs seek to establish custom in this Bhale Sultan clan of Sultanpur that when in a separated family a man dies with only a daughter or daughter's issue, and no son, the female line cannot succeed, collateral male heirs being preferred. I take this to deal with the Thakur or Chhattri branch only, not with bhaibands of the Khanzadas or converted Thakurs who vicariously adopt Mussalman and Hindu customs. The custom set up by the plaintiffs as pertaining to the Bhale Sultans is contrary to the established rules of Hindu succession of the Mitakshara school, where in a separated Hindu family succession is in favour of female issue in preference to male collaterals. To prove their case the plaintiffs offer evidence of two classes : (1) there is the documentary evidence offered by the settlement wajib-ul-arz filed : (2) there

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is a vast quantity of oral evidence offered. The defendant offers evidence of both classes to rebut, but in that the onus rests in the first instance on the plaintiffs."

After examining the 21 wajib-ul-arzes filed by the plaintiffs and rejecting 14 of them the District Judge said :—

"In the seven villages of which I have accepted the wajib-ul-arzes as fairly reliable I must hold these wajib-ul-arzes as by no means adding weight to the prevalence of the custom. The nature of the conditions, the language in which they are expressed convey to me the view that the men at whose dictation the documents were drawn up were all more or less uncertain about there being any definite rules or customs regarding Bhale Sultan succession. The custom as evidenced by them is not clear and unambiguous."

After a lengthy consideration of the oral evidence of many witnesses, 33 of whom gave instances of the custom, the District Judge came to the conclusion that there were very few instances of which there was any sort of corroboration and they were not sufficiently reliable to prove the custom set up. He was of opinion on the whole evidence of the custom

"that it has not been clearly established that in the Bhale Sultan clan of Chhattris there is any such custom by which the daughters and their issue are, in a separated family, excluded from inheriting. The plaintiffs are not therefore heirs in preference to the daughters, who are the lega heirs."

On the question of the plaintiffs being the next reversioners, the District Judge considered, on the evidence given as to the pedigree, that, besides the daughters, there were other heirs nearer than the plaintiffs.

He also held that Daryao Kunwar did not take an absolute estate in the property of her husband, but only the ordinary estate of a Hindu widow; that there was no legal necessity shown for her to alienate the property, and that she was not entitled to transfer the immovable property by the sale-deeds of 21st October 1872 and 24th July 1875, which were therefore not binding on the plaintiffs.

The District Judge therefore made a decree dismissing the suit with costs.

On appeal the Court of the Judicial Commissioners (MR. J. DEAS, Judicial Commissioner, and Mr. G. T. SPANKIE, Additional Judicial Commissioner) found that of the instances of the custom given by the plaintiffs' witnesses 20 were proved; and that of the wajib-ul-arzes the seven which had been accepted by the

District Judge as of some, though not sufficient, value were also strong evidence of the alleged custom, which they considered was established by the evidence. They were of opinion that the plaintiffs were the next reversioners on the death of Daryao Kunwar; and that the deeds of sale executed by her were under the circumstances valid and binding on the plaintiffs; thus coming to conclusions on every point contrary to those arrived at by the District Judge, but leading to the same result, *viz.* the dismissal of the suit. The material portions of the judgment of the Judicial Commissioners on the points in issue were as follows:—

"According to the Thauri *wajib-ul-arz* 'a daughter or her issue do not *alal-umum* obtain the share.' According to the Dadra *wajib-ul-arz* and that of Kuchit 'a daughter is excluded *alal-umum* from the share.' According to the Dharauli *wajib-ul-arz* 'a daughter *alal-umum* (and) a widow without issue, provided that her husband lived and ate jointly with other co-sharers, do not obtain the share.' According to the Dichauli *wajib-ul-arz* 'a daughter or her issue do not *alal-umum* obtain the share.' According to the Gajanpur *wajib-ul-arz* 'a daughter is excluded *alal-umum* from her father's share.' According to the Dahriawan *wajib-ul-arz* 'a daughter and her issue and illegitimate issue do not obtain the share.'

The 'share' referred to in all these cases in connection with the daughter is the share of her father. The general objections are that the word '*alal-umum*' means 'generally' 'as a general rule,' that is to say, not invariably, not universally; that the exclusion of the daughter may have reference to her exclusion in cases in which her father was a member of a joint family, and that the administration papers do not agree as to certain customs and therefore there is no definite and certain custom of succession. It was contended for the plaintiffs that the word '*alal-umum*' means 'universally', 'without exception.'

"We were not referred to any books as to the meaning of the word '*alal-umum.*' The word is derived from the Arabic word '*am,*' which means 'commonly,' 'generally.' As far as I can discover *alal-umum* means 'commonly,' 'generally,' and not 'universally.' It seems to me, however, that if the meanings 'commonly' or 'generally' are attached to the word, the value of the administration papers is not much affected, having regard to the fact that the defendant has not proved a single instance in which a daughter inherited the share of her deceased father. It seems to me that the argument that the exclusion of daughters may have reference to their exclusion where there is a joint family, has no force. There was no necessity for providing for their exclusion in such a case, as the Hindu Law excludes them. The object of the administration papers was to record customs varying the Hindu Law, not to record the Hindu Law. I think that the circumstances that the administration papers do not agree on such points as the power of the widow to adopt, or to alienate, or as to the mode of partition among the

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sons, or as to the right of the eldest son, on partition, to a larger share than his brothers, or as to the extent of the share he should take, or that some of the administration papers are silent on some of these points, do not affect the value of the seven administration papers in question. All the administration papers are consistent as to the exclusion of daughters. All the matters above mentioned cannot be deemed to constitute a custom of succession, so that it can be said that as there is not uniformity with respect to them, therefore there is no custom as to the daughters which is definite and certain. I also think that the circumstance that none of the seven administration papers in question relate to the property in suit, does not affect their value The custom set up is a tribal one. The circumstance that the administration papers of the villages in suit do not set forth the custom in dispute or indeed any custom is explained. They were prepared when Daryao Kunwar was in possession of the property. They are clearly 'concoctions' of hers. No weight can be attached to them as rebutting the evidence produced by the plaintiffs to prove the alleged custom. I think that considerable weight should be attached to the seven administration papers in question as evidence of the alleged custom.

"As to the statements made by the pleader for Daryao Kunwar and Maheshar Bakhsh Singh in the suit brought against them by Janga Kunwar, they are not, I think, admissible in evidence under section 18, Indian Evidence Act, as admissions. No doubt the defendant derives his interest in the subject-matter of the suit from his father and Daryao Kunwar, but the statements did not qualify or affect the title of those persons to that property.

"All the instances which I consider proved, may not be of the same value, but they all are, I think, consistent with, and evidence of, the existence of the alleged custom. In all the custom was set up. In some its existence was challenged, but subsequently the custom was submitted to. In most of those in which it was not set up and its existence was not challenged, there is no explanation offered as to why the person who was entitled to the property if the custom did not exist, did not claim it. In some instances the title of the person setting up the custom was open to dispute, at the time of the suit, limitation not having expired, and in others the property was of small value. Neverthless the custom was set up. Then there are the administration papers which the District Judge thought deserving of consideration and to which I think considerable weight should be attached. There are also the opinions of a considerable number of Bhale Sultan Chhattris in favour of the existence of the custom. The evidence of some of the witnesses for the defendant goes to show the existence of the custom. On the other side there is no evidence to show that the custom does not exist. I think that it is proved that a custom does prevail among the Bhale Sultan Chhattris in the Sultanpur District by which a daughter is excluded from inheriting the property of her deceased father, and her sons are also excluded from inheriting their maternal grandfather's property. . . . . ."

As to the validity of the transfer by Daryao Kunwar, after stating that it had not been shown that prior to the confiscation

after the rebellion in Oudh, of all proprietary rights in property Daryao Kunwar had acquired an absolute right to the property in dispute and that therefore the contention that the effect of the settlement of the property with her at the first regular Settlement was to restore her to such absolute right, failed, and she must be deemed to have held the property as a Hindu widow, the Judicial Commissioner's judgment proceeded:—

"On behalf of the defendant it is contended that the transfers having been assented to by Matadin Singh and Baijnath Singh and by other reversionary heirs, and for consideration, they had the effect of conveying an absolute title to the father of the defendant. The following cases were referred to, *Rajkristo Roy* v. *Kishoree Mohan Mojoomdar* (1), *Mohunt Kishen Geer* v. *Busgeet Roy* (2), *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (3), *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (4), *Noferdoss Roy* v. *Modhu Soondari Burmonia* (5), *Sia Dasi* v. *Gur Sahai* (6), *Ramadhin* v. *Mathura Singh* (7), *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (8), *Lala Parbhu Lal* v. *Mylne* (9) and *Behari Lal* v. *Madho Lal Ahir Gyawal* (10).

"Looking at the Settlement pedigree (exhibit A22) it will be seen that of the reversionary heirs who executed the deeds, Hanuman Singh and Sheo Dayal Singh were four degrees removed, and Sheo Bakhsh Singh, Sheonarain Singh, Baijnath Singh and Matadin Singh were five degrees removed from Jai Singh, the common ancestor of themselves and Sitla Bakhsh Singh. There do not appear to have been any other reversionary heirs alive at the time of the transfers, superior in degree to Hanuman Singh and Sheodayal Singh or equal in degree to Sheo Bakhsh Singh, Sheonarain Singh, Baijnath Singh, and Matadin Singh, or indeed any other reversionary heirs at all in the line of Jai Singh Rai.

"In the case of *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy* (8) a Full Bench of the Calcutta High Court decided that, under the Hindu Law current in Bengal, a conveyance by a widow upon the ostensible ground of legal necessity, such conveyance being assented to by the person who at the time is the next reversioner, will conclude another person, not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property. It would seem that three of the Judges at least, who were members of the Full Bench, including Garth, C. J., and Pigot, J., came to this conclusion not because they did not doubt its soundness, but because it was supported by a long course of authority in the Court and to decide otherwise would have the effect of disturbing a great number of titles. In the case of *Ram Chunder Poddar* v. *Hari Das Sen* (11) Garth, C. J., and

(1) (1865) 3 W. R., 14.
(2) (1870) 14 W. R., 379.
(3) (1861) 8 Moo. I. A., 529, at page 551.
(4) (1869) 13 Moo. I. A., 209, at page 228.
(5) (1880) I. L. R., 5 Calc., 732.
(6) (1880) I. L. R., 3 All., 362.
(7) (1888) I. L. R., 10 All., 407.
(8) (1884) I. L. R., 10 Calc., 1102.
(9) (1887) I. L. R., 14 Calc., 401, at page 418.
(10) (1891) L. R., 19 I. A., 30; I. L. R., 19 Calc., 236.
(11) (1882) I. L. R., 9 Calc., 463.

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Field, J., doubted the soundness of the principle upon which the decision in *Nobo Kishore Sarma Roy's* case is based, and Pigot, J., did so in *Gopeenath Mookerjee* v. *Kally Doss Mullick* (1). In *Ramphal Rai* v. *Tula Kuari* (2) a Full Bench of the Allahabad High Court disapproved of the principle. I agree with Pigot, J., that there seems to be no answer to Mr. Mayne's argument in justice. That argument will be found at the commencement of section 592 of Mr. Mayne's Work on Hindu Law (4th Edition). At the same time the proposition that in a case which would not otherwise justify a sale by a Hindu widow, the transaction will be rendered valid by the consent of the reversionary heirs, seems to have the authority of the Judicial Committee of the Privy Council. On a consideration of the cases cited it appears to me that a conveyance by a widow made with the consent of all the heirs of her husband living at the time, will conclude a person not living at the time who may be the heir of the husband at the time of the widow's death. In this view, if the transfers by Daryao Kunwar in favour of Maheshar Bakhsh Singh had been executed by Sheo Bakhsh Singh, Sheonarain Singh, Sheodayal Singh, Baijnath Singh, Hanuman Singh and Matadin Singh, or those persons had at that time in any other manner signified their consent to such transfers, such transfers would be valid as against the plaintiffs even if there were no legal necessity for them. Those persons did not at the time of the transfers signify their consent to them. They did so subsequently by the 'deeds of agreement' dated respectively the 4th May 1877 and 29th January 1878. The question then arises as to what the legal effect of the transfers, taken with the deeds of agreement, is.

"It was not disputed that the executants of these deeds received consideration for ratifying the transfers and agreeing not to dispute their validity. Indeed it was said that they were paid to execute the deeds. It was argued that they had mere contingent reversionary interests in expectancy and such interests could not be released or relinquished. It seems to me that the argument does not touch the point, which is, whether the effect of the transfers, taken with the deeds of agreement, is the same as if the executants of those deeds had joined Daryao Kunwar in transferring the property or had at the time of the transfers consented to them. I am unable to see any distinction between the two cases. It seems to me that the transfers, when ratified by the reversionary heirs for consideration, have the same effect as if the reversionary heirs had joined in making the transfers or had consented to them at the time they were made. I am of opinion, therefore, that the transfers having been ratified for consideration by the reversionary heirs, are valid as against the plaintiffs and Mahpal Singh, who were not reversionary heirs at the time the deeds of agreement were executed, even if there were no legal necessity for them. Further, I think, that the questions as to whether Daryao Kunwar understood the nature of the transfers, or as to whether the transfers were colourable do not arise. If they do, the plaintiffs were bound to give some proof that the transfers would not be binding

(1) (1883) I. L. R., 10 Calc., 225. (2) (1883) I. L. R., 6 All., 116.

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[illegible], or that they were colourable, and they have given [illegible]h, therefore, I think that at time when Daryao Kunwar died, [illegible] were the heirs of her husband; that Daryao Kunwar was in [illegible] property in dispute as a Hindu widow, and that the plain- [illegible]at by custom the property of a Bhale Sultan Chhattri [illegible]ral male kindred, notwithstanding his daughter or [illegible]et as I think that the sales of the property in suit [illegible]ant's father are valid as against the plain- [illegible] the appeal fails. I would therefore dismiss it with costs and confirm the decree of District Judge."

On this appeal it was co[illegible] that the appellants were the next reversioners.

G. E. A. Ross for the appella[illegible]ntended that the Court of the Judicial Commissioner [illegible] in error in holding that the transfers of the property [illegible] made by Daryao Kunwar were valid as against the [illegible] and had wrongly decided that as the deeds had been ratified by the then reversionary heirs they were binding on the appellants even though they were executed without any legal necessity. A Hindu widow did not take an absolute estate: the restrictions on her power to alienate the property inherited from her husband, in which she had only a special and qualified estate were such as to prevent her from disposing of it (unless such dispositions were clearly conducive to the spiritual welfare of her husband, or were for other religious or charitable purposes) in the absence of any legal necessity, in such a manner as to bind the collateral heirs of her husband. Reference was made to *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1). In the present case no legal necessity was shown or even alleged, therefore the alienations were not binding. As to the power of the widow to alienate the estate with the consent of the reversioners the cases cited by the Judicial Commissioners in support of it were all cases in which the widow made the alienation after obtaining the reversioners' consent. Here the widow made the alienations without any such consent, and they were ratified some years subsequently by only some of the reversioners who were not the present claimants to the estate, and who, it was submitted, could not bind the appellants by any agreement come to between themselves and the widow. Reference was made to *Bahadur*

(1) (1861) 8 Moo., I.A., 529.

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Singh v. *Mohar Singh* (1), where it was contend persons claiming as heirs of the husband on the dea widow were estopped by an arrangement made by f sionary heirs with the widow, and their Lo Judicial Committee said:—" This argument fa in law. There is no evidence of any repres found an estoppel; and even if the amounted to a contract be the then claima a contract is not bind the appellants. Accord to Indian law the claimants were but expectant heirs with a *spes successionis*. The app ts claim in their own right as heirs of Moha when the success ened, and it would be a novel proposition to hold that a person so ing is bound by a contract made by every person through whom traces his descent." *Bhagwanta* v. *Sukhi* (2) and Mayne's Hindu la th Ed., 855: 6th Ed., 637, 638 were referred to. The case of *Kishore Sarma Roy* v. *Hari Nath Sarma Roy* (3) referred to by in that passage, which was a case cited before the Judicial mittee in the case of *Bahadur Singh* v. *Mohar Singh* (1) only applied. it was contended, when the full body of the reversioners consented to the alienation. In the present case only some of the heirs ratified the transfers made by the widow. The present appellants therefore suing as they did as the next reversioners in existence at the time the succession opened out, were not barred by any disclaimer of reversionary rights claimed by their ancestors.

On the question whether the custom as to the exclusion of daughters was established by the evidence, on which the courts below differed, the cases of *Lekraj Kuar* v. *Mahpal Singh* (4), *Uman Parshad* v. *Gandharp Singh* (5) and *Lali* v. *Murlidhar* (6) as to the value of a wajib-ul-arz as evidence of custom, were cited; and the Evidence Act (I of 1872), section 32, clause (4) as to the admissibility of statements of deceased persons as to a custom, and section 48 as to the relevancy of the knowledge of

(1) (1901) L. R., 29 I. A. 1 (8); I. L. R., 24 All., 94 (107) (108).
(2) (1899) I. L. R., 22 All., 33.
(3) (1884) I. L. R., 10 Calc., 1102.
(4) (1879) L. R., 7 I. A., 63: I. L. R., 5 Calc., 744.
(5) (1887) L. R., 14 I. A., 112: I. L. R., 15 Calc., 20.
(6) (1906) L. R., 33 I. A., 97: I. L. R., 28 All., 488.

such persons as to the existence of the custom were also referred to.

DeGruyther for the respondent contended that on the evidence the alleged custom excluding daughters from succession was not established. But he chiefly relied upon the decision of the Judicial Commissioners that Daryao Kunwar had power to alienate the absolute estate with the consent of the reversioners; and that therefore the appellants were bound by the deeds of sale executed by her in favour of Maheshar Bakhsh Singh. That she was able to surrender her interest in the estate to the next heir of her husband was decided in the case of *Jadamoney Dabee* v. *Saroda Prosono Mukerjee* (1), which was considered settled law. Whether she could part with the absolute estate, only depended upon the concurrence of her husband's heirs: if they consented, the alienation was valid without proof of any legal necessity for it. Reference was made to *Rany Srimuty Dibeah* v. *Rany Koond Luta* (2), *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (3), *Raj Lukhee Debea* v. *Gokool Chunder Chowdhry* (4), *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (5) and *Behari Lal* v. *Madho Lal Ahir Gyawal* (6). These cases were all based on the principle that a Hindu widow had a right to relinquish the estate if she wished. And it was submitted that whether the heirs consented at the time of the alienation or ratified the transaction subsequently was immaterial. Here it was found by the appellate court that all those heirs interested in the estate as next reversioners ratified the transfers executed by the widow.

Ross replied.

31*st October* 1907:—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE:—

Sitla Bakhsh Singh, a Hindu of the tribe of Bhale Sultan Chhattris, resident in Sultanpur, died some time before the annexation of Oudh, leaving him surviving a widow named Daryao Kunwar, and two daughters, Janga Kunwar and Jagrani Kunwar. He was absolute owner of an estate known as Pindara Karnai and other property, which at his death passed to his

(1) (1856) Boulnois, 120.
(2) (1847) 4 Moo., I. A., 292.
(3) (1861) 8 Moo., I. A., 529 (550, 551).
(4) (1869) 13 Moo., I. A., 209 (228).
(5) (1884) I. L. R., 10 Calc., 1102.
(6) (1891) L. R., 19 I. A., 30: I. L. R., 19 Calc., 236.

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widow, and, at her death, would have passed to his daughters, but for a custom of the tribe excluding daughters and their issue from succession. The widow died on the 6th of August 1892, having previously sold the whole of the estate to her son-in-law Maheshar Bakhsh Singh, the husband of her daughter Jagrani Kunwar, and mutation of names in the Revenue Registers was effected in his favour. After the death of Maheshar, which occurred on the 3rd of April 1893, the name of his son, Manokarnika Bakhsh Singh, the present respondent, was entered in the Government Records as proprietor of the estate; and the present appellants (with one Mahpal Singh, who died while the case was pending) brought the suit now under appeal, claiming that, by reason of the custom of the Bhale Sultan Chhattris, they were the next heirs in reversion to the estate of Sitla Bakhsh.

In the Courts below and before their Lordships two main questions were raised. First, whether the custom had been proved; and, secondly, whether certain deeds confirming the sales by the widow to Maheshar, executed by the then nearest reversioners, and disclaiming all title to the property in dispute, were binding on their descendants, the appellants, who were the nearest reversioners at the time when the succession opened, at the widow's death. In the Courts in India, the District Judge held the custom not proved and the deeds not binding; the Judicial Commissioner came to the exactly opposite conclusion on both points. The conflict of opinion in the Courts in India upon the question of custom has made it necessary for their Lordships to examine carefully the evidence in this case, in order to ascertain whether the alleged custom has been satisfactorily proved. In making this examination, their Lordships have been materially assisted by the elaborate analysis of the evidence made by both the learned Judges below, and by the learned counsel who argued the appeal. They will briefly state the grounds on which they consider that the judgment of the Judicial Commissioner on this point must prevail.

The Bhale Sultan clan appear to have derived their name, some three centuries ago, from their warlike exploits in the service of the Emperors of Delhi. They are now settled in considerable numbers in the district of Sultanpur in Oudh, in several

villages, in which they constitute the bulk of the population. In the language of the Indian Evidence Act, 1872, (section 48) they form a "considerable class of persons." The evidence in support of the custom was mainly oral, and no document was produced of an earlier date than the British annexation. Thirty-five witnesses were examined on behalf of the appellants. They were all members of the Bhale Sultan clan, mostly men of mature age and of good position. They all gave evidence that in their clan it was the custom that daughters and their issue were excluded from succession to the separated estate of their father, and put forward thirty-nine instances in which this exclusion had taken place. The Judicial Commissioner held that twenty of these instances had been satisfactorily proved. For the respondent no evidence was given in contradiction of these instances, though ample time was allowed for the production of such testimony had it been available; but six witnesses were called, one of whom had signed a *wajib-ul-arz* in which the custom was set up, and two gave evidence in support of the custom.

In corroboration of the oral evidence, a number of village administration papers (*wajib-ul-arz*) were produced, of which seven were admitted by both Courts to be relevant, as relating to Bhale Sultan villages. In all these the rule is stated that a daughter and her issue do not *alal-umum* (that is, as a general rule) obtain the share. One of them is attested by 44 zamindars and lambardars of the village, another by 49, others by 8 or 10. The dates of these documents are not given, but they were all officially recorded prior to the institution of this suit, and quite independently of the parties thereto.

One other piece of evidence remains to be noticed. It has been stated that Sitla Bakhsh left two daughters, Janga Kunwar and Jagrani Kunwar. In 1876, Janga Kunwar filed a suit against her mother Daryao Kunwar and her brother-in-law Maheshar Bakhsh for a declaratory decree that she was entitled to succeed to half her father's estate; and in answer to her claim, the vakil for the defendants put forward the plea that "among Bhale Sultans a daughter never succeeded to the inheritance of her father." The Court came to no decision on the point, but

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disposed of the suit on another ground, reserving Janga Kunwar's right to put forward her claim on the death of her mother. The fact, however, that this defence was raised shows that the existence of the custom was present to the mind of Daryao Kunwar at the date of the transactions to which their Lordships will now proceed to refer.

Although Daryao Kunwar appears to have been willing to invoke the custom as a defence against the claim of her unmarried daughter, she was at the same time endeavouring to defeat the operation of the custom in regard to her married daughter, Jagrani Kunwar, and her husband, Maheshar Bakhsh Singh, the father of the present respondent. During the period from 21st October 1872 to 24th July 1875, she executed five deeds of sale, by which she purported to transfer, for valuable consideration, successive portions of her husband's property to Maheshar Singh. The District Judge has found that these deeds were executed without "legal necessity;" and it is certain that the preliminary consent of her husband's reversionary heirs was not obtained. One of these heirs, Matadin Singh, the father of the appellants Jagdamba Singh and Bajrangi Singh, brought a suit in the Court of the Deputy Commissioner of Sultanpur in 1873 to set aside three of the deeds; but on appeal this suit was dismissed on a technical ground by the Judicial Commissioner on the 6th May 1874. Janga Kunwar's suit, already referred to, was dismissed on the 25th August 1876. Having thus succeeded, for the time being, in the Courts, Daryao Kunwar entered into negotiations with the persons who were at that time admittedly the nearest reversionary heirs to her husband's estate, and obtained from them two documents, called deeds of relinquishment, one dated the 4th May 1877 and the other dated the 29th January 1878. The first of these was signed by five persons, four of whom died without issue in Daryao Kunwar's lifetime, and the fifth, Baijnath Singh, is the father of the plaintiff Mahpal Singh, who died while this suit was pending in the Court of the District Judge, and who is now represented by the appellants. The second was signed by Janga Kunwar, Matadin Singh (the father of the present appellants), and Hanuman Singh, who is still living, but is not a party to this suit. In these documents,

which are identical in terms, after enumerating the sales by Daryao Kunwar to Maheshar Singh, the executants go on to say:—

"We all have given our full consent to all those sale-deeds which the Thakurain has executed in favour of the Babu, and will ever remain so satisfied. And after the death of the Thakurain we shall bring no claim against the Babu on account of the movable and immovable property owned by her; hence we have executed this deed of agreement so that it may serve as an authority, and be of use in time of need."

"It was not disputed," says the Judicial Commissioner in his judgment, "that the executants of these deeds received consideration for ratifying the transfers and agreeing not to dispute their validity. Indeed it was said that they were paid to execute the deeds." Upon these facts, the Judicial Commissioner found that the transfers to Maheshar Singh were valid, and dismissed the appeal.

The restrictions imposed by the Hindu law upon the widow's power to alienate her deceased husband's estate have frequently been the subject of consideration by this Committee.

"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred." *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, (1).

"The kindred in such case," their Lordships observe in a later case, "must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law." *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*, (2).

Upon the practical application of this general principle there has been much discussion in the High Courts in India. A Full Bench of the High Court at Allahabad, in the case of *Ramphal Rai* v. *Tula Kuari* (3) considered that:—

"The plain principle deducible from these rulings of the Privy Council is that in order to validate an alienation by a Hindu widow of her deceased husband's estate for purposes other than those sanctioned by the Hindu law,

(1) (1861) 8 Moo., I. A., 529, at p. 551. (2) (1869) 13 Moo., I. A., 209, at p. 228.

(3) (1883) I. L. R., 6 All., 116.

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it must have the consent of all those among his kindred who can reasonably be regarded as having an interest in questioning the transaction."

And they accordingly held that the consent of the heir presumptive to an alienation by a widow was not sufficient to defeat the rights of a more remote reversioner, and that an assignment by the widow to the heir presumptive had no greater effect in her favour than it would have had if he had been a stranger.

"We think," say the learned Judges, "that the spirit of the Hindu law is to keep the right of succession to the deceased husband's estate open until the widow's death, free of any control by her, except in such cases as she has a power to adopt; and that no reversioner possesses such a present vested interest as enables him to combine with her in defeating his co-reversioners. In other words, her right and theirs have one common basis, that of survivorship to the widow, and it is incapable of anticipation."

The High Court of Calcutta has taken a different view, based upon a long current of authority in that Court, albeit two of the learned Judges—Garth, C. J., and Pigot, J.—considered that the principles on which the decision was founded were open to great objection. In the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (1) a Full Bench held that under the Hindu law current in Bengal—

"A transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property."

The ground of the decision is thus shortly stated by Garth, C. J.:—

"If it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may agree to make."

And more fully by Mitter, J.:—

"Whatever conflict there may be upon the question whether a Hindu widow may sell the whole inheritance without any legal necessity, merely with the consent of the next male heir, there is no conflict in the decisions, since the case of *Jadamoney Dabee* v. *Saroda Prosono Mookerjee* (2) was decided in the late Supreme Court of Calcutta, upon the question whether the relinquishment by a Hindu widow of her estate to the next male heir of her husband is valid or not. Such relinquishment by the widow has been held for a long series of years to be valid. . . . But if the widow is competent to relinquish her estate to the next male heir of her husband, it follows as a logical

(1) (1884) I. L. R., 10 Calc., 1102. (2) (1856) 1 Boulnois, 120.

consequence, that she can alienate it merely with his consent without any legal necessity."

In a subsequent case—*Radha Shyam Sircar* v. *Joy Ram Senapati*, (1)—the same High Court held that the consent must be of the whole body of persons constituting the next reversion.

The Calcutta decision, of course, is not binding upon other High Courts, but it has been followed in Madras. In the case of *Marutamuthu Nadan* v. *Srinivasa Pillai* (2) decided by a Full Bench of the Madras High Court in 1898, Subramania Ayyar, J., says :—

"I think it unnecessary to go into the question whether the Hindu law, according to the texts or the commentaries, lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which show that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Court. Since there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also. In such circumstances the rule as stated by the Judicial Committee in *Behari Lal* v. *Madho Lal* (3) should, I think, be taken to be a rule applicable to this Presidency too, subject, no doubt, to the restriction pointed out by their Lordships, *viz.*, that the surrender should be absolute and complete, and that the whole limited estate should be withdrawn, a restriction that would guard against the injurious results which would follow if the rule were not so qualified."

The question was also considered by the High Court of Bombay in 1901 in the case of *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* (4). In the course of his judgment Jenkins, C.J., says (at p. 133) :—

"There can be no question that, apart from legal necessity, a widow can validly alienate land that has devolved upon her from her husband with the consent of the reversioner. The basis on which this rests is a matter of controversy. The High Court of Calcutta on the whole appears to favour the view that the consent derives its effect from the power supposed to reside in a widow of accelerating, by the surrender of her own interest, the interests of the reversioners. It is impossible not to feel some

(1) (1890) I. L. R., 17 Calc., 896.

(2) (1898) I. L. R., 21 Mad., 128.

(3) (1891) L. R., 19 I. A., 30 I. L. R., 19 Calc., 236.

(4) (1900) I. L. R., 25 Bom., 129.

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difficulty as to this doctrine. . . . . The other view is that the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity. This has a parallel in the law relating to a widow's adoption under certain circumstances, and it finds support in the texts. . . . This view has too, in a measure, the sanction of the Privy Council."

And he quotes the cases of *Collector of Masulipatam* v. *Cavaly Vencata Narrainxpah* (1) and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (2) which have been already referred to. "Turning then to Bombay," he goes on to say, "the High Court here appears to have accepted this view rather than that which finds favour in Calcutta." In the same case Ranade, J., observes (at p. 139):—

"The Bengal theory that the widow's interest was a life interest, and that her surrender or release of that interest to the next reversioner accelerates his obtaining the full title has never met with much acceptance on this side of India. Our leading case—*Varjivan Rangji* v. *Ghelji Gokaldas*, (3)—lays down that the consent must be of all the kindred, but that does not mean that every single member who is a kindred must actually join in the conveyance."

And the conclusion to which he comes is that, in order to validate an alienation by a widow otherwise than from legal necessity

"The consent of the reversioners must be of such kindred the absence of whose opposition raises a presumption that the alienation was a fair and proper one."

The principle being thus admitted by the High Courts in India, the question of the *quantum* of consent necessary only remains. The High Court of Allahabad, indeed, does not recognize the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails. Their Lordships have not been referred to any cases in the Province of Oudh in which this restriction has been acted upon; and though they would be unwilling to extend the widow's power of alienation beyond its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish. They agree with the High

(1) (1861) 8 Moo., I. A. 529. (2) (1869) 13 Moo., I. A. 209.
(3) (1881) I. L. R., 5 Bom., 563.

Court of Calcutta—*Radha Shyam Sircar* v. *Joy Ram Senapati* (1)—that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

Applying this rule to the case now under consideration, the Judicial Commissioner has found that "of the reversionary heirs who executed the deeds, Hanuman Singh and Sheo Dayal Singh were four degrees removed, and Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh, and Matadin Singh were five degrees removed from Jai Singh, the common ancestor of themselves and Sitla Bakhsh Singh. There do not appear to have been any other reversionary heirs alive at the time of the transfers superior in degree to Hanuman Singh and Sheo Dayal Singh or equal in degree to Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh, and Matadin Singh, or indeed any other reversionary heirs at all in the line of Jai Singh Rai." Their Lordships agree with the Judicial Commissioner that the consent of these persons was sufficient, and that it is immaterial that it was given after the execution of the deeds. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* The appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the decree of the Judicial Commissioner dated the 6th March 1900 confirmed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants:—*Barrow, Rogers and Nevill.*

Solicitors for the respondent:—*Watkins and Lempriere.*

J. V. W.

(1) (1890) I. L. R., 17 Calc., 896.

1907
May 27.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

MAHARAJ SINGH (DEFENDANT) *v.* CHITTAR MAL (PLAINTIFF) *

Civil Procedure Code, sections 473 *(c)*, 588 (23)—*Decree—Order—Appeal—Interpleader suit.*

Held that an adjudication upon the claims of defendants in an interpleader suit is a decree and appealable as such under section 540 of the Code of Civil Procedure and not under section 588 of the Code.

THIS was a suit by the Municipal Board of Kasganj as lessee of a certain parao, or camping ground, asking for a decision as to the person to whom the rent for 1904-05 was payable. One Chittar Mal, defendant, claimed the whole rent upon the ground that he had purchased the entire parao in execution of a decree against one Sheoraj Singh, as manager and head of a joint family. Sheoraj Singh did not appear, but his brother Maharaj Singh contested the suit upon the ground that the parao was ancestral property in which he was entitled to a half share and that Chittar Mal was only entitled to one half of the rent in virtue of his purchase of Sheoraj Singh's interest. The Court of first instance (Munsif of Kasganj) decided in favour of Chittar Mal for the whole rent. On appeal by Maharaj Singh this decree was affirmed by the Additional District Judge. Maharaj Singh thereupon appealed to the High Court.

Lala *Girdhari Lal Agarwala*, for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the respondent.

BANERJI, J.—This appeal arises out of an interpleader suit brought under section 471 of the Code of Civil Procedure by the Collector of Etah, as Chairman of the Municipal Board at Kasganj, against the parties to this appeal. It appears that the Municipal Board of Kasganj had taken on rent a camping ground *(parao)* which belonged to Sheoraj Singh and his brother, Maharaj Singh, the present appellant. Chittar Mal, respondent, obtained a decree against Sheoraj Singh, and in execution of it caused the *parao* to be sold by auction and purchased it

* Second Appeal No. 478 of 1906 from a decree of Khetter Mohan Ghosh, Additional Judge of Aligarh, dated the 14th of March 1906, confirming a decree of Kameshwar Nath, Munsif of Kasganj, dated the 23rd of September 1905.

himself. The rent for the year 1904-05 was not received either by Maharaj Singh or by Chittar Mal. The former claimed a half share in it, while the latter demanded the whole of it. Thereupon the Collector of Etah filed the present suit in order that it might be determined by the Court to whom the rent was to be paid. The Court directed the parties to the present appeal, who were defendants to the suit, to interplead one another, and in the end adjudicated in favour of Chittar Mal, holding that he was entitled to the whole of the money due by the Municipal Board. The decision of the Court of first instance having been affirmed by the lower appellate Court, this appeal has been preferred by Maharaj Singh.

A preliminary objection was taken to the hearing of the appeal on the ground that the appeal from the order of the Court of first instance lay to the lower appellate Court under clause (23) of section 588 of the Code of Civil Procedure; that the decision of the lower appellate Court is final, and that this appeal is not maintainable. In my judgment the objection is not well founded. Section 588 of the Code provides for appeals from orders made in interpleader suits under section 473, clauses *(a)*, *(b)* or *(d)*, section 475 or section 476. It is urged that the decision complained of is an order under clause *(b)* of section 473. It seems to me that section 588 only provides for an appeal from such decisions under section 473 as amount to orders as distinguished from decrees.

A decree is defined by section 2 of the Code to be the formal expression of an adjudication upon any right claimed or defence set up, when such adjudication, so far as regards the Court expressing it, decides a suit or appeal. Any adjudication of title under section 473 is, therefore, a decree and is appealable under section 540. Orders under clauses (*a*), (*b*) and (*d*) are appealable under section 588. Clause (*d*) provides for two things, namely, (1) a direction to the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and (2) an adjudication on such claims. The direction as to interpleading is an order and is appealable under section 588. The adjudication upon the claims of the defendants is a decree and stands on the same footing as an adjudication referred to in

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clause (c) of the section. It is, therefore, appealable under section 540 of the Code of Civil Procedure. It seems to me that the Legislature could not have intended that an adjudication as to the title to the thing claimed under clause (c) of section 473, should be either final and not appealable or should be appealable as a decree, and yet an adjudication under the last portion of clause (d), which is also an adjudication as to title, should be appealable as an order only and not as a decree. It seems to me that when the Legislature omitted clause (c) of section 478 from the provisions of section 588 clause (23) and provided only for appeals from orders made under section 473, it clearly meant that adjudications upon title, which are decrees, should be appealable like ordinary decrees under section 540. As, for the above reasons, the decision in this case is a decree, the present appeal is maintainable and the preliminary objection must be overruled.

As regards the merits of the case the contention of Chittar Mal was that the debt, for the realization of which the property in question was sold, had been incurred by Sheoraj Singh as manager of a joint Hindu family for the purposes of that family and that the auction sale in execution of the decree obtained in respect of that debt conveyed to the purchaser the interest of both the brothers. Maharaj Singh, on the other hand, alleged that he was separate from his brother. The Court of first instance found, and this finding has also been affirmed by the lower appellate Court, that the two brothers formed a joint family; that Sheoraj Singh was the head of it; that the debt was binding on Maharaj Singh, and that the auction sale for the realization of that debt conveyed to the purchaser the interests of both the brothers.

The first ground taken in the memorandum of appeal to this Court is that there is nothing to show that the decree obtained by Chittar Mal was passed against Sheoraj Singh in his capacity of manager of a joint Hindu family. No certificate, as required by the rules, has been furnished in regard to this ground. It cannot, therefore, be entertained.

The next plea in the memorandum of appeal refers to an entry in the khewat of the names of both the brothers. That

entry is not inconsistent with the finding that both brothers were joint.

The third plea refers to certain decisions in suits with which the present litigation has nothing to do. It is alleged that in one at least of these suits it was held that the brothers were joint.

The learned vakil for the appellant contends that the lower appellate Court ought to have found whether the debt was contracted for a family necessity. It seems to me that the Court did intend to hold that the debt was incurred for the purposes of the family, but there was no express finding because in the memorandum of appeal to the lower appellate Court no plea was taken to that effect. The appeal, in my opinion, has no force, and the findings of the Court below are fatal to it. I dismiss the appeal with costs.

Appeal dismissed.

1907
May 30.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Richards.

GENDA (DEFENDANT) *v.* SUKH NATH RAI (PLAINTIFF) AND RAI SINGH (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 177, 199, 200—*Question of proprietary title—Appeal—Civil and Revenue Courts—Jurisdiction.*

When a Revenue Court, under the powers conferred on it by section 199 of the Agra Tenancy Act, 1901, decides a question of proprietary title it becomes for the moment a Civil Court; an appeal lies at the instance of either party to the District Judge, and if such an appeal is wrongly preferred to and decided by a Commissioner, such decision will have no effect in preventing the Revenue Court's decree from becoming final.

THIS was a suit to recover possession of land, and also for an injunction restraining the defendants from interfering with the possession of the plaintiff. The plaintiff's case was that the defendants had been his tenants, that they had been duly ejected and had retaken possession. One of the defendants appeared and pleaded that the possession was possession as owners, and that they were not and had never been the tenants of the plaintiff *quoad* the land in dispute. It appears that in a suit in the

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* Second Appeal No. 263 of 1906, from a decree of G. C. Badhwar, Additional Judge of Saharanpur, dated the 18th of December 1905, reversing a decree of Murari Lal, Munsif of Saharanpur, dated the 18th of September 1905.

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Revenue Court between the same parties the defendants had pleaded that they were proprietors and not tenants. The Assistant Collector on the 19th of January 1903 gave a decree for possession deciding the question of proprietary title himself against the defendants. There was an appeal to the Commissioner, who reversed the finding of the Assistant Collector. The Court of first instance (Munsif of Saharanpur) held that, the Commissioner having no jurisdiction under the circumstances to entertain an appeal from the decision of the Assistant Collector, that decision was final and accordingly dismissed the plaintiff's suit. On appeal by the plaintiff the Additional District Judge reversed the decree of the Munsif and passed a decree in favour of the plaintiff. From this decree the answering defendant appealed to the High Court.

Maulvi *Muhammad Ishaq*, for the appellant.

Babu *Durga Charan Banerji* (for whom Munshi *Gokul Prasad*), for the respondents.

KNOX, ACTING C.J and RICHARDS, J.—This was a suit to recover possession of land, and also for an injunction restraining the defendant from interfering with the possession of the plaintiffs. The plaintiff's case was that the defendant had been his tenant, that the latter had been duly ejected and had retaken possession. The defendant pleaded that his possession was the possession of an owner, and that he was not and had never been the tenant of the plaintiff *quoad* the land in dispute. It appears that in a suit in the Revenue Court between the same parties the defendant had pleaded that he was a proprietor and not a tenant. The Assistant Collector on the 19th of January 1903 gave a decree for possession deciding the question of proprietary title himself against the defendant. There was an appeal to the Commissioner, who reversed the finding of the Assistant Collector. It is quite clear that if the Commissioner had any jurisdiction to entertain the appeal, his decision is binding on the parties and that the plaintiff cannot succeed in the present suit. On the other hand, if the decision of the Commissioner was made absolutely without jurisdiction, and if the decree of the 19th of January 1903 was made by a Court of competent jurisdiction and never set aside on appeal by a Court competent to set it aside, the decree of the 19th

January 1903 must bind the parties. It then becomes necessary to decide the question as to whether or not the Commissioner had jurisdiction to entertain the appeal from the decree of the 19th January 1903. The defendant contends that the Commissioner had no jurisdiction. Section 177 of the Agra Tenancy Act, 1901, provides for appeals to the District Judge in a number of cases, and amongst others, clause (*e*), in all suits in which a question of proprietary title has been in issue in the Court of first instance and is a matter in issue in appeal. Now it is quite clear that in the present case a question of proprietary title was in issue before the Assistant Collector and was also a matter in issue in appeal. *Primâ facie*, therefore, it would appear that an appeal lay to the District Judge and not to the Commissioner. We think that it was clearly the intention of the Legislature that in cases where a question of proprietary title arises, the ultimate decision of the case should rest with the Civil Court, and not with the Courts of Revenue. It is argued, however, that section 179 provides that an appeal shall lie to the Commissioner from all suits included in group C of the fourth schedule to the Act. Now the suit in which the decree of the 19th January 1903 was made was clearly included (at the time of its institution) in group C, and the argument is that, notwithstanding the provisions of section 177, to which we have referred, the appeal did lie to the Commissioner. The section is no doubt somewhat ambiguous. A reference to section 199 makes the matter fairly clear. That section provides that if in any suit filed in the Revenue Court against a person who is alleged to be the plaintiff's tenant, the defendant pleads proprietary right, the Revenue Court is either to require the defendant to go to the Civil Court, as provided by clause (*a*), or to determine the question itself, as provided by clause (*b*). It must be assumed that in the suit before the Assistant Collector, the latter decided to determine the question himself which in fact he did do when he gave the decree of the 19th January 1903. Clause (3), section 199, then provides that when the Court decides the question of proprietary title, it shall follow the procedure laid down in the Code of Civil Procedure. Section 200 provides how the District Judge or the High Court are to deal with appeals from the Revenue Court where a question of

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title has been determined by that Court. In our judgment when the Assistant Collector decided to determine the question of title himself, the suit ceased to be a suit included in group C, and the Revenue Court for the purposes of that suit ceased to be a Revenue Court in the strict sense of the word and became for the moment a Civil Court competent to try the question of proprietary title, with a right of appeal by either party to the District Judge. The result is that we allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance. As we think that the defendant ought to have raised the question of jurisdiction of the Commissioner when the appeal was taken from the Assistant Collector to him, we make no order as to costs.

Appeal decreed.

1907 *May* 31.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Richards.

HANSRAJ PAL (PLAINTIFF) *v.* MUKHRAJI KUNWAR AND OTHERS (APPLICANTS) AND DALPAT PAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 232—Decree for possession of immovable property—Sale of property decreed—Right to execute decree.

If a decree-holder holding a decree for possession of immovable property sells a portion of such property, the sale does not, without express provision to that effect give the purchaser any right to execute the decree himself. *Ram Sahai* v. *Gaya* (1) referred to.

IN this case one Hansraj Pal having obtained a decree for the possession of certain immovable property sold a portion of the property so decreed, but did not execute any assignment of the decree. The vendees made an application under section 232 of the Code of Civil Procedure contending that the effect of the sale deed was to transfer to them a right to execute the decree to the extent of the property comprised therein. The Court to which this application was made (Subordinate Judge of Gorakhpur) refused the application. On appeal, the District Judge held that section 232 of the Code, did apply under the circumstances and that the applicants were entitled to execute the decree in the manner asked for, and accordingly set aside the order of the first Court and remanded the case under section 562 of

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* First Appeal No. 82 of 1906, from an order of R. L. H. Clarke, District Judge of Gorakhpur, dated the 23rd of May 1906.

(1) (1884) I. L. R., 7 All., 107.

the Code. From this order the plaintiff appealed to the High Court.

Munshi *Iswar Saran* for the appellant.

Munshi *Gobind Prasad*, for the respondents.

KNOX, ACTING C.J., and RICHARDS, J.—In this suit the plaintiff obtained a decree for possession of certain immovable property. After recovery of the decree the plaintiff sold a portion of the property to different persons reserving some portion of the property to himself. The respondents applied under section 232 of the Code of Civil Procedure, contending that by the sale deed the decree had been transferred to them to the extent of the property mentioned in the sale deed, and that they were entitled to execute the decree. The Court to which the application was made refused the application. The present respondents appealed, with the result that the decision of the Court of the first instance was reversed, the Court holding that section 232 did apply under the circumstances and respondents were entitled to execute the decree in the manner they asked, and remanded the case under section 562 of the Code of Civil Procedure. The decree-holder now appeals against the order of remand. He contends that no appeal lay from the decision of the Court of first instance, the Court having refused to allow the respondents to execute the decree under section 232. He also contends that under no circumstances could the provisions of section 232 apply to the transaction between him and the respondents. We will take the second point first, because if this point be decided in favour of the appellant, it becomes quite unnecessary to decide whether or not an appeal lay from the order refusing to allow execution under section 232. We have considered the sale deed, which is on the record, and we find that it in no way purports to sell or transfer the decree. The only reference to the decree is that the vendor states, after selling the property and having referred to the description of it, "to which my title has been declared by the decree," *et cetera*. We have to consider whether a sale of the property for possession of which a vendor has obtained a decree necessarily carries with it assignment of decree itself. We certainly think that it does not. It might happen that a vendor might get a decree for possession of the property together with an award of a large sum for mesne

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profits and costs. It could never be contended that if before he executed the decree he sold the property or a portion of it that this sale deed without express words would carry with it the right to the mesne profits and costs. In the decision of this Court in *Ram Sahai* v. *Gaya* (1) Mr. Justice Mahmood has further illustrated the difference between a transfer of property and a transfer of a decree. It is the respondents' misfortune, if, when obtaining a sale deed of the property, they neglected to provide either that the decree should be assigned to them or that the decree-holder should be bound to execute the decree and put them into possession. We wish to point out that in deciding this appeal in favour of the appellant, we do so on the ground that no application could legally be made to execute the decree under section 232. We make this remark lest our present decision should prejudice any suit which the respondent may be advised to institute in order to get the benefit of their sale deed. As a result, we must allow the appeal, set aside the order of the lower appellate Court and restore that of the Court of first instance with costs.

1907
June 3.

Before Mr. Justice Aikman.

KANIZ FATIMA (DEFENDANT) *v.* WALI-ULLAH AND OTHERS (PLAINTIFFS).*

Benamidar—Suit for sale on a mortgage—Decree giving benamidar a right to redeem—Right to redeem not availed of—Subsequent suit for redemption by alleged beneficial owner barred.

A decree for sale on a mortgage was passed giving a right of redemption to a puisne mortgagee. The puisne mortgagee did not redeem and the decree became absolute. *Held* that no subsequent suit for redemption would lie by a person alleging that he was the real puisne mortgagee and that the person whose name appeared in the decree as puisne mortgagee was merely a benamidar.

THE facts of this case are as follows:—

IN 1891 the predecessor in title of one Musammat Sadiq-un-nissa made a mortgage in favour of Hakim Waris Ali of the property in suit. On the 18th of January 1897 Sadiq-un-nissa and her husband made a mortgage of the same property in favour of

* Second Appeal No. 599 of 1906, from a decree of Pitambar Joshi, Subordinate Judge of Bareilly, dated the 12th of April 1906, confirming a decree of Banke Bihari Lal, Munsif of Bareilly, dated the 30th of June 1905.

(1) (1884) I. L. R., 7 All., 107.

one Ali Jan. In 1900 Hakim Waris Ali brought a suit upon his mortgage, making Ali Jan the puisne mortgagee, a party to the suit. In that suit Hakim Waris Ali got a decree for sale, an opportunity being given both to the mortgagor and to Ali Jan, to redeem Waris Ali's mortgage. The mortgage was not redeemed, and an order absolute was passed under section 89 of the Transfer of Property Act. The present suit was brought by one Wali-ullah, who came into Court alleging that he was the real mortgagee of the mortgage of 1897, and that Ali Jan was his benamidar, and he sued on the strength of his secret title to bring the property to sale after redeeming Waris Ali's mortgage. There is no suggestion that the prior mortgagee knew that Ali Jan was merely a benamidar. The Court of first instance (Munsif of Bareilly) gave the plaintiff a decree and this decree was confirmed on appeal by the Subordinate Judge. The present appeal was preferred by one of the defendants, Kaniz Fatima, who purchased the property from Musammat Sadiq-un-nissa in 1893.

Mr. *Muhammad Ishaq Khan* and Munshi *Jang Bahadur Lal*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiff Wali-ullah for sale upon a mortgage after redemption of a prior mortgage. It appears that in 1891 the predecessor in title of one Musammat Sadiq-un-nissa made a mortgage in favour of Hakim Waris Ali of the property in suit. On the 18th of January 1897 Sadiq-un-nissa and her husband made a mortgage of the same property in favour of one Ali Jan. In 1900 Hakim Waris Ali brought a suit upon his mortgage, making Ali Jan, the puisne mortgagee, a party to the suit. In that suit Hakim Waris Ali got a decree for sale, an opportunity being given both to the mortgagor and to Ali Jan to redeem Waris Ali's mortgage. The mortgage was not redeemed, and an order absolute was passed under section 89 of the Transfer of Property Act. The respondent, Wali-ullah, now comes into Court alleging that he was the real mortgagee of the mortgage of 1897, and that Ali Jan was his benamidar, and he sues on the strength of his secret title to bring the property to sale after redeeming Waris Ali's mortgage. There

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is no suggestion that the prior mortgagee knew that Ali Jan was merely a benamidar. The Courts below have given the plaintiff a decree. Kaniz Fatima, who purchased the property from Musammat Sadiq-un-nissa in 1893, comes here in second appeal.

In my opinion the first plea in the memorandum of appeal must be sustained. The plaintiff's benamidar was given an opportunity to redeem and failed to avail himself of it. In my opinion it is now too late for the plaintiff to come in and treat the order absolute passed against his benamidar as a nullity. It has been held in many cases that a decision passed in a suit brought by a benamidar binds the beneficial owner. I see no reason why a similar rule should not be applied to the case of a suit brought against the benamidar. In my opinion the plaintiff is bound by the decree in Waris Ali's suit and he has lost his right of redemption. It may be that, as representing Ali Jan, he may pay the money due to the prior mortgagee if an application is made for the sale of the property, but in my opinion his suit, as brought, ought to have been dismissed.

For the above reasons I allow the appeal and set aside the decrees of the Courts below. The appellant will have her costs in all Courts.

Appeal decreed.

1907
June 18.

REVISIONAL CIVIL.

Before Mr. Justice Aikman.

ABDUL HAMID (PLAINTIFF) *v.* RIAZ-UD-DIN (DEFENDANT).*

Civil Procedure Code, section 506—*Arbitration—Reference made orally, but reduced to writing by the Court—Irregularity.*

Where both parties to a pending suit consented to a reference to arbitration and an order of reference was then and there made by the Court in the presence of the parties, though not upon a written application, it was *held* that it was not open to the Court, having regard to the provisions of section 510 of the Code of Civil Procedure, to supersede that reference, the arbitrator not having declined to act. *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (1) distinguished. *Shama Sundram Iyer* v. *Abdul Latif* (2) and *Luxumibai* v. *Hajee Widina Cassum* (3) followed.

THIS was an application for the revision of a decree of the Court of Small Causes at Agra. The applicant filed a suit against

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* Civil Revision No. 34 of 1907, against the decree of Muhammad Sirajuddin, Judge of the Court of Small Causes, Agra, dated the 9th of March 1907.

(1) (1855) 6 Moo. I. A., 134. (2) (1899) I. L. R., 27 Calc., 61.
(3) (1899) I. L. R., 23629.

the opposite party. On the 21st of December 1906 the Judge of the Court of Small Causes recorded a proceeding stating that the parties, being identified by their respective vakils, stated that they agreed to accept any decision on the case which should be given by one Babu Tika Ram, vakil, and that they agreed to pay him any reasonable fee for arbitration, the fee to be paid by them in equal shares. Thereupon the Court made a reference of the matters in dispute to the arbitration of Babu Tika Ram and fixed his fee at Rs. 45, ordering the parties each to pay in one half of this sum. He fixed the time within which the arbitrator was to return his award. The following day the plaintiff stated that he had paid his half share of the fee fixed for the arbitrator and asked that the defendant might be ordered to pay his half share. Upon this the Court ordered the defendant to pay his half share to the arbitrator or deposit it in Court by the 4th of January 1907. The defendant not having paid his share of the fee, the plaintiff, on the 4th of January 1907, paid it in on his behalf and asked that the payment should be included in the costs of the case. Upon this the Court ordered the parties to nominate another arbitrator who would not charge any fee. This not having been done, the Court superseded the arbitration and itself passed a decree in the case. The plaintiff then applied in revision to the High Court contending that, the case having been referred to the arbitration of Tika Ram with the consent of the defendant, and the said arbitrator not having refused to act, the defendant should not be allowed to withdraw from the reference without valid cause, and also that under the circumstances stated the Court below had no jurisdiction to supersede the arbitration and proceed with the trial of the suit.

Maulvi *Ghulam Mujtaba* and Babu *Satya Chandra Mukerji*, for the applicant.

The Hon'ble Pandit *Sundar Lal* and Babu *M. L. Sandal*, for the opposite party.

AIKMAN, J.—This is an application for the revision of a decree of the Court of Small Causes at Agra. The applicant filed a suit against the opposite party. On the 21st of December 1906 the Judge of the Court of Small Causes recorded a proceeding stating that the parties, being identified by their respective

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vakils, stated that they agreed to accept any decision on the case which should be given by one Babu Tika Ram, vakil, and that they agreed to pay him any reasonable fee for arbitration, the fee to be paid by them in equal shares. Thereupon the Court made a reference of the matters in dispute to the arbitration of Babu Tika Ram and fixed his fee at Rs. 45, ordering the parties each to pay in one half this sum. He fixed the time within which the arbitrator was to return his award. The following day the plaintiff stated that he had paid his half share of the fee fixed for the arbitrator and asked that the defendant might be ordered to pay his half share. Upon this the Court ordered the defendant to pay his half share to the arbitrator or deposit it in Court by the 4th of January 1907. The defendant not having paid his share of the fee, the plaintiff, on the 4th of January 1907, paid it in on his behalf and asked that the payment should be included in the costs of the case. On the same date the learned Judge recorded an order to the effect that "probably the defendant did not understand that he would have to pay in money to the arbitrator." It is difficult to say how the learned Judge arrived at this conclusion in the face of what had taken place on the 21st of December. The learned Judge thereupon ordered the parties to nominate another arbitrator who would not charge any fee. This not having been done, the learned Judge superseded the arbitration and himself passed a decree in the case. The plaintiff comes here in revision contending that the case having been referred to the arbitration of Tika Ram, with the consent of the defendant, and the said arbitrator not having refused to act, the defendant should not be allowed to withdraw from the reference without valid cause, and it is also contended that under the circumstances stated the Court below had no jurisdiction to supersede the arbitration and proceed with the trial of the suit.

The learned vakil who appears for the opposite party contends that the reference was invalid on the ground that there was no application in writing, as required by the last paragraph of section 506 of the Code of Civil Procedure, and in support of his contention relies on the case of *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (1). That case was under a special Regulation

(1) (1855) 6 Moo. I. A., 134.

of the Bombay Presidency, and the application for arbitration was a private one and not one made in the course of any suit. It has been distinguished in the case *Shama Sundram Iyer* v. *Abdul Latif* (1), where it was held that the second paragraph of section 506 is directory only and that in a case where both parties consented to a reference to arbitration and where the order of reference was made by the Court in the presence of their counsel or advocates, though not upon a written application, such a reference is not a nullity, but merely an irregularity not affecting the merits of the case or the jurisdiction of the Court. The Privy Council case was also distinguished in the case *Luxumibai* v. *Hajee Widina Cassum* (2). In my opinion when the parties applied orally to the Judge, and the Judge reduced their application to writing and then made a reference, it was not open to him, having regard to the provisions of section 10 of the Code, to supersede that reference, the arbitrator not having declined to act.

I accordingly allow the application, set aside the decree of the learned Judge of the Court of Small Causes, and direct that the case be dealt with in the manner provided by his order of the 21st of December last, an extended date being fixed within which the arbitrator shall give his award. If the defendant does not, within a reasonable time, pay in his share of the arbitrator's fee, it shall be received from the plaintiff and be included in the costs.

The applicant will have the costs of this application in any event.

(1) (1899) I. L. R., 27 Calc., 61. (2) (1899) I. L. R., 23 Bom., 629.

1907
June 22.

APPELLATE CIVIL.

Before Mr. Justice Richards.

KASHI (PLAINTIFF) *v.* BAJRANG PRASAD (DEFENDANT).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 92 *and* 94—*Mortgage —Redemption—Subsequent suit for profits received by mortgagee barred.*

In a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagee right up to the time of actual redemption or sale, as the case may be. A mortgagor therefore who has obtained a decree for redemption and paid in what was found by the decree to be due from him cannot subsequently sue for profits realized by the mortgagee in possession, which might and ought to have been taken into account at the time of passing the decree. *Vinayak Shivrao Dighe* v. *Dattatraya Gopal* (1) referred to.

THE facts of this case are as follows:—In the year 1902 the plaintiff sued for redemption of certain mortgaged property. A decree was obtained on the 17th of December 1902. On appeal the amount decreed for redemption was increased, but the decree was confirmed on the 3rd of February 1903. The plaintiff paid what was due according to the decree and got possession some time in the earlier part of the year 1903. The present suit was then instituted by the plaintiff to recover certain money which he alleged was due by the defendant: he said the defendant received certain rents out of the property from August 1902 to March 1903. The Court of first instance (Munsif of Farrukhabad) decreed the plaintiff's claim in part. On appeal, however, the lower appellate Court reversed the decree of the Court of first instance and dismissed the suit altogether. The plaintiff thereupon appealed to the High Court.

Mr. *M. L. Agarwala* and Munshi *Gulzari Lal*, for the appellant.

Pandit *M. L. Sandal* and Lala *Kedar Nath*, for the respondent.

RICHARDS, J.—The facts out of which this appeal arises are shortly as follows:—In the year 1902 the plaintiff sued for redemption of certain mortgaged property. A decree was obtained on the 17th of December 1902. On appeal the amount decreed for redemption was increased, but the decree was

* Second Appeal No. 1147 of 1905, from a decree of Raj Nath Prasad, Subordinate Judge of Farrukhabad, dated the 16th of August 1905, reversing a decree of Upendro Nath Sen, Munsif of Fatehgarh, dated the 25th of May 1905.

(1) (1902) I. L. R., 26 Bom., 661.

confirmed on the 3rd of February 1903. The plaintiff paid what was due according to the decree and got possession some time in the earlier part of the year 1903. The present suit was then instituted by the plaintiff to recover certain money which he alleged was due by the defendant: he says the defendant received certain rents out of the property from August 1902 to March 1903. During the time that these alleged profits were received by the defendant, he was undoubtedly in possession of the property as mortgagee, and it is impossible to deny that the present suit is a suit for a further settlement and adjustment of accounts between the plaintiff and the defendant occupying the positions of mortgagor and mortgagee. The plaintiff contends that what he is sued for was not covered by the previous accounts between the parties, and according to the judgment of the Court of first instance this allegation is not without foundation. It is contended, however, on behalf of the defendant, that the present suit cannot be maintained. There is no doubt that the settlement of account between the plaintiff and the defendant, (that is, the amount for which each was liable to account) was directly and substantially in issue in the previous suit. I think it absolutely clear that in a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee, right up to the time of actual redemption or sale as the case may be. Section 92 of the Transfer of Property Act provides that in a redemption suit the Court is to pass a decree ordering that an account be taken of what *will be* due to the defendant upon a date to be fixed by the Court, when clearing the amount to be due. Section 94 speaks of the final adjustment of the amount to be paid by a mortgagor in case of redemption. In the case *Vinayak Shivrao Dighe* v. *Dattatraya Gopal* (1). Jenkins, C.J., makes some very cogent remarks as to what ought to be the result, between parties, of accounts in mortgage suits. I entirely agree with these remarks, and in my judgment the claim of the plaintiff in the present case could and ought to have been settled in the previous litigation and that a separate suit does not now lie. I accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1902) I. L. R., 26 Bom., 661.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1907
June 27.

RADHA BAI (PLAINTIFF) *v.* KAMOD SINGH AND OTHERS (DEFENDANTS).*

Act No. XVI of 1882 *(Jhansi Incumbered Estates Act), sections* 8 *and* 28—*Mortgage—Unlawful consideration—Act No. IX of* 1872 *(Indian Contract Act), section* 23—*Act No. IV of* 1882 *(Transfer of Property Act), section* 43.

Held that a mortgage executed by a mortgagor who was at the time disqualified under section 8 of the Jhansi Incumbered Estates Act, 1882, was a contract entered into for an unlawful consideration within the meaning of section 23 of the Indian Contract Act, and that section 43 of the Transfer of Property Act, 1882, could not be prayed in aid to empower the mortgagee to bring a suit for foreclosure after the mortgagors' disability had ceased.

THIS appeal arose out a suit for foreclosure of a mortgage made on the 10th of July 1896 by the defendants, Kamod Singh, Bhagwant Singh, Ratan Singh, Hira Singh and Mangal Singh, the last two of whom were minors on that date and executed the document through their guardian, Kamod Singh. The defendants Nos. 6 and 7 are the sons of Kamod Singh and were made parties as members of a joint Hindu family. The defendants, Bhagwant Singh, Ratan Singh, Hira Singh and Mangal Singh are the sons of Gandharp Singh, who died in 1891. Under the Jhansi Incumbered Estates Act, No. XVI of 1882, Kamod Singh and Gandharp Singh had been declared to be disqualified proprietors, and admittedly were so when they executed the mortgage in suit. The court of first instance (Subordinate Judge of Jhansi) on this ground refused to grant a decree for foreclosure, but passed a decree for money against Bhagwant Singh and Ratan Singh two of the sons of Gandharp Singh. The plaintiff appealed to the High Court, contending that she was entitled to a decree for foreclosure, and the defendants Bhagwant Singh and Ratan Singh filed objections under section 561 of the Code of Civil Procedure contending that the claim for a money decree against them was barred by limitation.

Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the appellant.

Mr. *Karamat Husain*, for the respondents.

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit for foreclosure of a mortgage made on the 10th of July 1896 by

* First Appeal No. 221 of 1905 from a decree of Pramatha Nath Banerji, Subordinate Judge of Jhansi, dated the 22nd of May 1905.

the defendants, Kamod Singh, Bhagwant Singh, Ratan Singh, Hira Singh and Mangal Singh, the last two of whom were minors on that date and executed the document through their guardian, Kamod Singh. The defendants Nos. 6 and 7 are the sons of Kamod Singh and have been made parties as members of a joint Hindu family. The defendants, Bhagwant Singh, Ratan Singh, Hira Singh and Mangal Singh are the sons of Gandharp Singh, who died in 1891. Under the Jhansi Incumbered Estates Act, No. XVI of 1882, Kamod Singh and Gandharp Singh had been declared to be disqualified proprietors. One of the disabilities attaching to this declaration was that those persons were incompetent to mortgage their proprietary rights in land or any part thereof [see section 8, clause (*c*) (1)]. Under section 28, clause (*b*) of the Act, this disability extended to any person succeeding to the proprietary rights of those persons, and therefore to the sons of Gandharp Singh after his death. It is an admitted fact that at the date of the execution of the conditional sale deed in question, the executants of that document were labouring under this disability. The Court below has on this ground refused to enforce the deed and grant a decree for foreclosure: but it has made a decree for money against Bhagwant Singh and Ratan Singh, two of the sons of Gandharp Singh, apparently overlooking the provisions of section 28 to which we have referred above. If a money decree could be passed against those persons, there is no reason why a similar decree should not have been passed against Kamod Singh. The plaintiff appeals from the decree of the lower Court and contends that, having regard to the provisions of section 43 of the Transfer of Property Act, she was entitled to a decree for foreclosure, inasmuch as the mortgagors were subsequently released from disability on the 3rd of November 1896. In our opinion this plea cannot prevail. The consideration for the loan was the mortgage of their property by the disqualified proprietors. Such a mortgage being forbidden by the provisions of the Jhansi Incumbered Estates Act, the consideration was one forbidden by law. It was also of a nature which if permitted would defeat the provisions of that Act. The agreement therefore was one the consideration of which was unlawful within the meaning of section 23 of the Contract Act,

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and was consequently void. The provisions of section 43 of the Transfer of Property Act cannot be applied to an agreement of this nature. This disposes of the first plea taken in the memorandum of appeal. The second plea is that the plaintiff is in any event entitled to a money decree against the respondents Nos. 1 to 5. This plea might have prevailed had the claim for a money decree not been barred by the law of limitation. The bond provides that the amount secured by it is to be repaid by annual instalments of Rs. 700, half of which is to be repaid on the 15th of Pus Sudi and the other half on the 15th of Jeth Sudi every year. It further provides that on the instalments remaining unpaid for two years the mortgagors shall pay the whole of the amount together with interest in a lump sum. It is admitted that no instalment was paid. The last of the two years' instalments became payable on the 4th of June 1898. Therefore under the terms of the bond the whole amount secured by it became payable on that date and time began to run under article 75, schedule II of the Limitation Act, from that date. There is no question of waiver in this case. As the suit was not brought until after the expiry of six years from the date on which the whole amount of the debt became due, the claim for a money decree was barred. In this view the second plea taken in the memorandum of appeal must fail and the objection raised on behalf of the respondents under section 561 of the Code of Civil Procedure must prevail, the result being that the plaintiff's suit must stand dismissed. We accordingly dismiss the appeal with costs, and, allowing the objections under section 561 with costs, dismiss the plaintiff's suit. We do not interfere with the order of the Court below in regard to the costs of the defendants in that Court.

Appeal dismissed.

REVISIONAL CRIMINAL.

1907
July 17.

Before Mr. Justice Richards.

DEBI PRASAD, (APPLICANT) *v.* SHEODAT RAI, OPPOSITE PARTY. *

Criminal Procedure Code, sections 145, 435 *and* 537—*Revision—Procedure—Irregularity not prejudicial to either party.*

In the course of proceedings commenced under section 107 of the Code of Criminal Procedure it was found by the Magistrate that there was a dispute relating to land and likely to cause a breach of the peace between the two parties before him. After giving both an opportunity of being heard, the Magistrate passed an order under section 145 of the Code maintaining one party in possession. *Held* that, notwithstanding that the procedure of the Magistrate was in some respects defective, there was no cause for the exercise of the revisional jurisdiction of the High Court, inasmuch as the parties had been given an opportunity of representing their respective cases, and there was nothing to show that the irregularities in procedure which had occurred had caused any prejudice to either. *In the matter of the petition of T. A. Martin* (1) referred to.

THIS was an application to revise an order made under section 145 of the Code of Criminal Procedure. It would appear that the matter originated by a police report that there was likely to be a breach of the peace between two brothers owing to a dispute about land and asking that proceedings should be taken under section 107 and also under section 145. On the 17th of September 1906 the Deputy Magistrate issued notices to the parties under section 107 to show cause why the parties should not be bound over to keep the peace. On the 5th of October 1906 the case came on, and the Court, finding that the dispute was really a dispute about land, ordered the proceedings to come on under section 145. Statements had been put in by both parties in the proceedings under section 107. The parties attended in Court, the patwari was examined, and the Court, finding that the opposite party had proved their possession, made an order providing for the possession of the opposite party. Against this order Debi Prasad applied in revision to the High Court.

Mr. *W. Wallach*, for the applicant.

Mr. *M. L. Agarwala*, for the opposite party.

RICHARDS, J.—This was an application to revise an order made under section 145 of the Code of Criminal Procedure. It

* Criminal Revision No. 248 of 1907, against an order of Nizam-ud-din Ahmad, first class Magistrate of Ghazipur, dated the 18th of February 1907.

(1) (1904) I. L. R., 27 All., 296.

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would appear that the matter originated by a police report that there was likely to be a breach of the peace between two brothers owing to a dispute about land and asking that proceedings should be taken under section 107 and also under section 145. On the 17th of September 1906 the Deputy Magistrate issued notices to the parties under section 107 to show cause why the parties should not be bound over to keep the peace. On the 5th of October 1906 the case came on, and the Court, finding that the dispute was really a dispute about land, ordered the proceedings to come on under section 145. Statements had been put in by both parties in the proceedings under section 107. The parties attended in Court, the patwari was examined, and the Court finding that the opposite party had proved their possession, made an order providing for the possession of the opposite party. Of course the order of the Magistrate is made without reference to the merits of the claim of either of the parties, and they are entitled to take such proceedings as they think right to have their real title ascertained and declared. The object of the section is merely to prevent a breach of the peace by maintaining one or other of the parties in the possession which the Court finds they had immediately before the dispute. In the present case the provisions of section 145 were not strictly complied with. The parties being in Court and the order being made in their presence the Court did not direct that they should be served personally. No notice of the order was fixed to any place at or near the subject of dispute. It certainly would be well that all Magistrates proceeding under section 145 should in all cases strictly comply with the various provisions of the section, and if I could find that the applicants here had been in the smallest way prejudiced by any omission to comply with the provisions of the section, I should feel bound to set aside the order complained of. Orders made by the Magistrates are not under ordinary circumstances liable to be revised by the High Court. There is an express provision in section 435 of the Code of Criminal Procedure that the Court cannot under that section deal with proceedings under chapter XII (in which section 145 is included). It has, however, been held in Criminal Reference No. 189 of 1903, that the High Court can under certain circumstances interfere with

orders purporting to be made under section 145, and this ruling was followed and to some extent extended in the case of *T. A. Martin* (1). The facts in Criminal Reference No. 189 of 1903 are somewhat similar to the facts in the present case, and, as I have already said, whatever my individual view of the provisions of section 435 might be, I should follow that ruling and set aside the order if I found that the applicant had been in any way prejudiced by the order. In the present case, however, I am quite satisfied that there was a dispute about land; that there was an apprehension of a breach of peace arising out of this dispute about land, and I find also that the parties interested in the dispute appeared and had their case fully heard before the Deputy Magistrate. The order he made is dated the 18th of February 1907, and the present application was not filed until the 18th of May following. It also appears that it took 13 days to get a copy of the judgment; but, even allowing for this time, a very considerable period was allowed to elapse before any steps were taken to set aside the order of the Deputy Magistrate. All the provisions of section 145 which were not complied with are provisions enacted for the purpose of enabling both parties to the dispute to have their respective cases fully heard by the Court after due notice. In the present case the parties had notice and had their respective cases fully heard, and the learned counsel for the applicant admits that he is unable to point out, or even suggest, any injury suffered by his clients due to the non-compliance with the provisions of the section. Section 537 of the Code of Criminal Procedure expressly provides that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity, unless such irregularity has in fact occasioned a failure of justice. I think it would be an extremely technical reading of this section to hold that the order passed by the learned Deputy Magistrate was not an order of a Court of competent jurisdiction merely because there were irregularities in part of the procedure causing no injury to either party. Under any circumstance it is a matter entirely in the discretion of this Court whether or not it will in revision set aside an order, and in exercise of this

(1) (1904) I. L. R., 27 All., 296.

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discretion I refuse in the present case to set aside the order. With the consent of both parties I make an express direction that the order of the Magistrate shall be deemed to apply only to plot No. 58. Inasmuch as I consider that it is of the greatest importance that Magistrates should strictly comply with the provisions of the Code, I direct that a copy of this judgment be sent to the Deputy Magistrate who tried the case. The application is rejected.

1907 *July* 20.

APPELLATE CIVIL.

Before Mr. Justice Dillon.

BANWARI LAL AND OTHERS (PLAINTIFFS) *v.* MUSAMMAT GOPI (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 199 *(a)—Limitation —Defendant referred to Civil Court—Act No. XV of* 1877 *(Indian Limitation Act), schedule II, article* 120.

When, under section 199 of the Agra Tenancy Act, 1901, an order is passed by a Revenue Court directing the defendants to file a suit in a Civil Court within the time limited by that section, the ordinary period of limitation is thereupon suspended and the special period provided by the Tenancy Act is substituted.

The defendants filed a suit in the Civil Court within three months. It was decided against them. They appealed, and in appeal withdrew their suit with liberty to bring a fresh suit. *Held* that the fresh suit, filed after the expiry of the period limited by the order of the Revenue Court, was barred, and the defendants could not fall back upon the provisions of the Indian Limitation Act, 1877.

THE facts of this case are as follows :—

One Manick Chand, ancestor of the defendant respondent, instituted a suit against the plaintiffs in the Revenue Court for arrears of rent in respect of two groves situated in mauza Bithri. In that suit the present plaintiffs, who were then defendants, pleaded that they had proprietary rights in the grove in question. Thereupon the Revenue Court passed an order on the 13th of November 1903, under section 199, clause (*a*) of Act No. II of 1901, requiring them to institute a suit within three months in the Civil Court for the determination of such question of title. They accordingly instituted a suit in the Civil Court, which was

* Second Appeal No. 505 of 1906, from a decree of Pitambar Joshi, Subordinate Judge of Bareilly, dated the 24th of March 1906, reversing a decree of Udit Narain Singh, Munsif of Havali, Bareilly, dated the 27th of June 1905.

decided against them on the 13th of May 1904. They appealed on the 20th of June 1904, but withdrew the appeal with leave to bring a fresh suit on the 5th of September 1904. Before the appeal was filed, the Revenue Court, presumably following the decision of the Munsif, dated 13th May 1904, gave an *ex parte* decree for rent against them on the 11th of June 1904. The plaintiffs then brought the present suit, on the 29th of March 1905, sixteen months after the passing of the Revenue Court's order referring them to the Civil Court, asking for a declaration that they were owners in possession of the groves. The Court of first instance (Munsif of Bareilly) decreed the claim. The lower appellate Court (Subordinate Judge of Bareilly) reversed the Munsif's decree and dismissed the suit, holding that it was not maintainable, inasmuch as it was instituted beyond the period of three months allowed by the order of the Revenue Court, dated 13th November 1903. The plaintiffs appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellants.

Babu *Sital Prasad Ghosh*, for the respondent.

DILLON, J.—The suit out of which this appeal has arisen was brought by the plaintiffs appellants for a declaration that they are the owners in possession of the groves Nos. 2806 and 2814 situated in mauza Bithri. The facts of the case are as follows:—One Manick Chand, ancestor of the defendant respondent, instituted a suit against the plaintiffs in the Revenue Court for arrears of rent in respect of these groves. In that suit the present plaintiffs, who were then defendants, pleaded that they had proprietary rights in the grove in question. Thereupon the Revenue Court passed an order on the 13th of November 1903, under section 199, clause (*a*) of Act No. II of 1901, requiring them to institute a suit within three months in the Civil Court for the determination of such question of title. They accordingly instituted a suit in the Civil Court, which was decided against them on the 13th of May 1904. They appealed on the 20th of June 1904, but withdrew the appeal with leave to bring a fresh suit on the 5th of September 1904. Before the appeal was filed, the Revenue Court, presumably following the decision of the Munsif, dated 13th May 1904, gave an *ex parte* decree for rent against them on

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the 11th of June 1904. The plaintiffs have now brought the present suit on the 29th of March 1905, sixteen months after the passing of the Revenue Court's order, referring them to the Civil Court, and the question is whether such a suit is maintainable. The lower appellate Court has held that it is not, inasmuch as it was instituted beyond the period of three months allowed by the order of the Revenue Court, dated 13th November 1903, and has dismissed the plaintiffs' suit. For the appellants it was ably argued by Dr. *Satish Chandra Banerji* that the suit was not barred by the special period of limitation provided by section 199 of Act No. II of 1901, and that under article 120 of schedule II of the Limitation Act, No. XV of 1877, it could be brought at any time within six years from the date when the cause of action accrued to the plaintiff. It was further argued that the decision of the Revenue Court, dated 11th June 1904, in the rent suit did not finally decide the question of title, and that it does not therefore bar the present suit. For the defendant respondent it was contended that the suit was barred by the special period of limitation provided by section 199 and also by the decision of the Revenue Court, dated 11th June 1904, decreeing the suit for rent. I shall first proceed to consider and decide the question whether or not the limitation provided by section 199 of Act No. II of 1901 overrides the longer period of limitation, namely, six years, provided by article 120 of schedule II of Act No. XV of 1877. In my opinion when an order under section 199 of Act No. II of 1901 is passed by a Revenue Court directing the defendants to file a suit in a Civil Court within the time limited by that section the ordinary period of limitation is thereupon suspended and the special period provided by the Tenancy Act is substituted. There would be no meaning in the Legislature having provided a special period of limitation by section 199 if it were possible for the party affected by the order under that section to bring a suit at any time within the ordinary period of limitation. There is no authority on the point, or at least none has been cited, and it seems to me that the view taken by the Court below is the only reasonable view. It is clear that the effect of the withdrawal by the plaintiffs of their former suit is the same as if they had never brought such a suit. They have, therefore, entirely failed to

obey the order of 13th November 1903 which directed them to bring a suit in a Civil Court within three months from the date of such order, and the present suit is therefore barred. I accordingly decide this point against the plaintiffs appellants. In this view it is unnecessary to decide the second question as to whether or not the decision by the Revenue Court in the rent case bars the present suit. The appeal therefore fails and is dismissed with costs.

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BANWARI LAL *v.* MUSAMMAT GOPI.

Appeal dismissed.

1907 *August* 14.

Before Mr. Justice Banerji and Mr. Justice Aikman.

EMPEROR *v.* MAHENDRA SINGH AND ANOTHER.*

Criminal Procedure Code, sections 110 *and* 526—*Security for good behaviour—Transfer.*

Held that proceedings under section 110 of the Code of Criminal Procedure cannot be transferred to any Court outside the district within which such proceedings have been lawfully instituted. *In the matter of the petition of Amar Singh* (1) and *In the matter of the petition of Gudar Singh* (2) followed.

IN this case proceedings under section 110 of the Code of Criminal Procedure were pending against two persons by name Chaudhri Mahendra Singh and Ujagar Singh in the Court of a Deputy Magistrate of the Etawah district. Several witnesses had been examined, and the case stood adjourned for a few days, when the Magistrate of the district ordered two Tahsildars to proceed to the locality and collect evidence bearing on the case. Mahendra Singh and Ujagar Singh thereupon applied to the High Court for the transfer of the proceedings against them to some other district upon the ground that the action of the District Magistrate had seriously prejudiced their chances of being discharged.

Mr. *C. Ross Alston*, for the applicants.

The Assistant Government Advocate (Mr. *W. K. Porter*) for the Crown.

BANERJI and AIKMAN, JJ.—It has been held by this Court in *In the matter of the petition of Amar Singh* (1) and in *In the matter of the petition of Gudar Singh* (2) that a case like the

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* Miscellaneous No. 97 of 1907.

(1) (1893) I. L. R., 16 All., 9. (2) (1897) I. L. R., 19 All., 291.

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present cannot be transferred to another district. The question is open to argument, but we do not feel ourselves justified in disregarding these rulings. We therefore dismiss the application. At the same time we cannot approve of the action taken by the District Magistrate, however well-intentioned that action may have been, specially having regard to the fact that the case might come before himself in appeal under section 406 of the Code of Criminal Procedure.

1907 *July* 24.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

LOHRE (PLAINTIFF) *v.* DEO HANS AND ANOTHER (DEFENDANTS).*

Appeal—Parties—Estoppel—Procedure.

The plaintiff having obtained a decree against one of two defendants acquiesced in that decree, but the defendant judgment-debtor appealed, making the other defendant also a party to his appeal, with the result that the plaintiff's suit was dismissed. *Held* that it was not open to the plaintiff in second appeal to contend that the Court below should have made a decree against that defendant with regard to whom he had acquiesced in the dismissal of his suit. *Farzand Ali Khan* v. *Bismillah Begam* (1) followed.

THE plaintiff in this case sued a tenant, one Deo Hans, for rent. The tenant pleaded payment of the whole rent to Sita Ram, the plaintiff's co-sharer in the holding. The Court of first instance decreed the suit as against Sita Ram and dismissed it *quâ* Deo Hans. Sita Ram then appealed, making Deo Hans a party to his appeal, but the plaintiff acquiesced in the decree which he had obtained against Deo Hans alone. The lower appellate Court (District Judge of Agra) allowed Sita Ram's appeal, and dismissed the suit. The plaintiff appealed to the High Court, urging that the Court below was wrong in dismissing the plaintiff's claim as against both defendants.

Pandit *Mohan Lal Sandal*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondent Sita Ram.

BANERJI and AIKMAN, JJ.—The suit which has given rise to this appeal was brought by Lohre, appellant, against Deo Hans, respondent, for arrears of rent for the years 1309 to 1312 Fasli.

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* Second Appeal No. 158 of 1906 from a decree of F. E. Taylor, District Judge of Agra, dated the 12th of December 1905 reversing a decree of Habib-Ullah, Assistant Collector, Agra, dated the 28th of June 1905.

(1) (1904) I. L. R., 27 All., 23.

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The plaintiff joined as a defendant to the suit Sita Ram, respondent, who, he said, was his co-sharer and had refused to join in bringing the suit. The Court of first instance dismissed the claim as against Deo Hans and decreed it against Sita Ram. The plaintiff acquiesced in this decree and did not appeal against that part of it which dismissed his claim against Deo Hans. Sita Ram appealed, making the plaintiff and Deo Hans respondents to the appeal. The lower appellate Court decreed the appeal and dismissed the suit. The plaintiff has preferred this appeal, and contends that the Court below ought to have made a decree in his favour against Deo Hans. This contention is untenable. The plaintiff having submitted to the decree of the first Court dismissing the claim against Deo Hans, and there being no appeal by the plaintiff against Deo Hans, the appellate Court could not on the appeal of Sita Ram make a decree in favour of one respondent against the other. Several rulings having been cited to us, but the case most in point is that of *Farzand Ali Khan* v. *Bismillah Begam* (1). This ruling is against the appellant. The appeal fails and is accordingly dismissed with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1907
October 30.

BALAK PURI (DEFENDANT) *v.* DURGA (PLAINTIFF) AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 365—*Death of sole plaintiff—Claim of one of the defendants to continue the suit as plaintiff—Abatement of suit.*

The original plaintiff sued for redemption of a mortgage executed by her father. She claimed as the only unmarried daughter of three, arraying as defendants, besides the mortgagee, her surviving married sister and the minor children of the second sister, deceased. During the pendency of the suit the plaintiff died. *Held* that, the claim being personal to the plaintiff, the suit abated and that the surviving sister could not be permitted to carry on the suit in substitution for the original plaintiff.

THIS was a suit brought by one Musammat Parbhawati, one of the four daughters of one Nar Singh Bhan, for redemption of two mortgages of the 7th of July 1871 and 26th of September 1871, executed in favour of the Akhara Panchaiti to secure two

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* First Appeal No. 91 of 1905 from a decree of Rajnath Sahib, Subordinate Judge of Allahabad, dated the 24th of March 1905.

(1) (1904) I. L. R., 27 All., 23.

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sums amounting together to Rs. 6,000. Nar Singh Bhan died on the 1st of July 1886, and upon his death some litigation ensued between the parties who were interested in his property, and on the 19th of February 1895 possession of the substantial part of the mortgaged property was surrendered by the Akhara to the surviving three daughters of the mortgagor; only a small tiled house of little or no value remaining with the mortgagees. The plaintiff Musammat Parbhawati was at this time a minor. The present suit was instituted by Musammat Parbhawati on the 12th of May 1904, but on the 5th of December 1904, after the pleadings had been filed by the respective parties, the plaintiff died. Upon her death, however, an application was made by Musammat Durga, one of the plaintiff's married sisters, a defendant in the suit, to have her name removed from the list of defendants and substituted as the sole plaintiff. The Court below acceded to this application, caused the name of Musammat Durga to be entered on the record as plaintiff in place of her sister and passed a decree in her favour. From this decree the defendant Balak Puri appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the appellant.

Maulvi *Rahmat-ullah* and Babu *Jogindro Nath Mukerji*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal against the decree of the Subordinate Judge of Allahabad in a suit brought by Musammat Parbhawati, one of the four daughters of one Nar Singh Bhan, for redemption of two mortgages of the 7th of July 1871 and 26th of September 1871, executed in favour of the Akhara Panchaiti to secure two sums amounting together to Rs. 6,000. Nar Singh Bhan died on the 1st of July 1886, and upon his death some litigation ensued between the parties who were interested in his property. It is unnecessary to deal with this litigation; suffice it to say that on the 19th of February 1895 possession of the substantial part of the mortgaged property was surrendered by the Akhara to the three surviving daughters of the mortgagor; only a small tiled house of little or no value remained with the mortgagees. The plaintiff Musammat Parbhawati was at this time a minor. It is alleged by the Akhara

Panchaiti that on the 5th of February 1895 a sum of Rs. 5,700 was paid to the daughters of Narsingh Bhan as representing surplus collections of the profits recovered by the Akhara as mortgagees. Whether or not this sum was paid it is unnecessary for us to determine. We did not think it necessary, in the view which we take of the case, to ask Mr. *Banerji*, the learned advocate for the appellant, to lay before us the evidence in support of this alleged payment. The learned Subordinate Judge appears to have had considerable doubt as to whether this payment was made or not; but as we have said, however this may be, we do not consider it necessary to determine it in the present appeal.

On the 12th of May 1904 the present suit was instituted by Musammat Parbhawati abovementioned, but on the 5th of December 1904, after the pleadings had been filed by the respective parties, Musammat Parbhawati died. Now on a perusal of the plaint it is clear beyond doubt that the right which she claimed was a personal right. Her case was that as the unmarried daughter of her father, Nar Singh Bhan, she was at the time of his death entitled to the entire of his property to the exclusion of her sisters. Her claim is set forth in the second paragraph of the plaint. Her surviving sister Musammat Durga, and also the heirs of a deceased sister, were sued as defendants in the suit. If Musammat Parbhawati had lived and the suit had come to a hearing during her life and been determined in her favour, she would have been entitled to the exclusion of Musammat Durga and the other defendants to the property in dispute, for the estate of a Hindu daughter, and that estate would have determined with her death, and, therefore, it appears to be clear that her suit was one to establish a personal right, and it did not survive, but abated upon her death. Upon her death, however, an application was made by Musammat Durga who was, as we have said, a defendant in the suit, to have her name removed from the list of defendants and substituted as the sole plaintiff. The Court below acceded to this application, we think improperly. The claim of the plaintiff Parbhawati being a personal claim did not survive; on the contrary the suit abated upon her death, and it was not competent for the Court below to substitute Musammat Durga as plaintiff in her place.

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BALAK PURI v. DURGA.

We now make the order which the Subordinate Judge should have, in our opinion, passed, and declare that the suit abated on the death of the original plaintiff, Musammat Parbhawati, and that the order substituting Musammat Durga as plaintiff in her stead should not have been made. We give the costs of the appeal to the appellant.

We think it right to say that our judgment in this appeal is not to be taken as in any way prejudicing the right of Musammat Durga to institute any suit she may be advised against the appellant in respect of the mortgaged property.

Appeal decreed.

1907. *November* 13.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

EMPEROR *v.* TABARAK ZAMAN KHAN. *

Act No. XLV of 1860 *(Indian Penal Code), sections* 182, 211—*Criminal Procedure Code, section* 195—*Information given to the police alleged to be false—Procedure—Notice.*

Where a District Magistrate upon a report made by the police that information given to them charging a person with a specific crime is false, orders the person giving such information to be prosecuted under section 211 of the Indian Penal Code, such order is not an order to which section 195(*b*) of the Code of Criminal Procedure applies, neither is the order passed without jurisdiction if no previous notice to show cause is given to the accused. The more proper course, however, would be to let the informant bring his witnesses into Court, hear them out, and then, if the case was considered to be a false case, to pass an order that the informant should be tried under section 211 of the Indian Penal Code. *Queen Empress* v. *Ganga Ram* (1), *Emperor* v. *Tula* (2) and *Haibat Khan* v. *Emperor* (3) distinguished.

THE facts of this case are as follows:—

One Tabarak Zaman Khan on the 7th June last sent a letter written by himself through his servant Sumera to the Sub-Inspector of Kampil Police Circle, charging one Sukha Ahir with having committed the offence of theft. The police investigated the case, and, considering the charge not proved, sent in what is known as *naksha B*. They asked that the case might be expunged from the register of crimes and that a case might be

* Criminal Reference No. 585 of 1907, by Muhammad Ishaq Khan, Sessions Judge of Farrukhabad, in respect of an order of D. Calnan, District Magistrate of Farrukhabad, dated the 18th of July 1907.

(1) (1885) I. L. R., 8 All., 38. (2) (1907) I. L. R., 29 All., 587.
(3) (1905) I. L. R., 33 Calc., 31.

instituted against Tabarak Zaman Khan for having given false information to the Police. The proceedings never went any further and never reached any Court. The District Magistrate after perusing them passed an order to the effect that a case might be instituted against Tabarak Zaman Khan and that he should be charged with having committed an offence under section 211 of the Indian Penal Code. Against this order Tabarak Zaman Khan applied in revision to the Sessions Judge, who, being of opinion that the Magistrate's order was irregular as having been passed without notice to Tabarak Zaman Khan, submitted the record to the High Court under section 438 of the Code of Criminal Procedure with the recommendation that the Magistrate's order should be set aside.

KNOX, J.—Tabarak Zaman Khan on the 7th June last sen a letter written by himself through his servant Sumera to the Sub-Inspector of Kampil Police Circle, charging one Sukha Ahir with having committed the offence of theft. The police investigated the case, and, considering the charge not proved, sent in what is known as *naksha B*. They asked that the case might be expunged from the register of crimes and that a case might be instituted against Tabarak Zaman Khan for having given false information to the Police. The proceedings never went any further and never reached any Court. The District Magistrate after perusing them passed an order to the effect that a case might be instituted against Tabarak Zaman Khan and that he should be charged with having committed an offence under section 211 of the Indian Penal Code. The learned Sessions Judge was asked to consider this order and to send it on to this Court for revision. He has done so. He considers that in passing the order he did, the Magistrate took action under section 195, clause (*b*) of the Code of Criminal Procedure. He is of opinion that the applicant should have been given an opportunity to prove the charge which had been brought by his servant, and that an order of this kind, being an order prejudicial to Tabarak Zaman Khan, should not have been passed without notice given to Tabarak Zaman Khan. The order passed by the District Magistrate could not have been an order under section 195(*b*) of the Code of Criminal Procedure. By making his report at the police thana

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EMPEROR v. TABARAK ZAMAN KHAN.

at Kampil, Tabarak Zaman Khan had committed no offence in, or in relation to, any proceeding in any Court, the more so, as he did not follow up his report by complaint in any Court. Section 195(*b*) has no application to the case, and the argument based by the learned Sessions Judge upon it falls to the ground. The cases which the learned Sessions Judge has referred to in his letter of reference to this Court, *viz.*, *King Emperor* v. *Ganga Ram* (1) and *Emperor* v. *Tula* (2), refer to complaints which had been lodged in a Criminal Court, and in both these cases no further action could be taken against the complainant except under a sanction expressly given under section 195 (*b*) of the Code of Criminal Procedure. The case of *Haibat Khan* v. *Emperor* (3) was a case in which "a judicial inquiry" had been held by a Court. Here also a sanction under section 195 (*b*) would have been necessary before any action could be taken against the complainant.

The argument that the order should not have been passed without notice to Tabarak Zaman Khan, in my opinion proceeds too far. If the view taken by the learned Sessions Judge be correct, then an order passed by the District Magistrate upon what is known as *naksha B.* to the effect that an accused person should be sent up for trial for murder or theft, when the Police considers that there is no case of murder or theft, would be an order without notice given to the supposed murderer or thief, to show cause why such prejudicial order should not be passed against him. As a rule in cases like the one before me, the safer and more proper course is undoubtedly to let the informant bring his witnesses to the Court, hear them out, and then pass an order, if the case is considered to be a false one, to the effect that the informant be tried for having instituted a false case; but I am not prepared to hold that the Magistrate while passing an order like the one under reference is acting without jurisdiction merely because the informant had not an opportunity given him to show cause why a case under section 211 should not be instituted against him. The case before me is really one for inquiry under section 182 of the Indian Penal Code, and not under section 211

(1) (1885) I. L. R., 8 All., 38. (2) (1907) I. L. R., 29 All., 587.
(3) (1905) I. L. R., 33 Calc., 31.

of the Indian Penal Code. After these remarks I decline to interfere, and return the record to the Court below for such action as it may think necessary to take.

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EMPEROR v. TABARAK ZAMAN KHAN.

1907 *November* 21.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

RUP CHAND (PLAINTIFF) *v.* DASODHA AND ANOTHER (DEFENDANTS).*

Guardian ad litem—*Appeal—Guardian* ad litem *not made a party by appellant—Limitation.*

Where a guardian *ad litem* of a defendant respondent was not made a party to an appeal filed by the plaintiff until after the period of limitation for filing such appeal had expired, it was *held* that the appeal was not for this reason time-barred. *Khem Karan* v. *Har Dayal* (1) followed.

THE facts of this case, so far as they are necessary for the purposes of this report are as follows. The suit was brought by one Rup Chand, for a declaration that he and his uncle Hardwari Lal, were beneficially entitled as members of a joint Hindu family to all the ancestral property derived from one Narain Das. The defendant Musammat Dasodha, the widow of Lalu Mal a great grandson of Narain Das, defended the suit upon the ground that the family was separate. Musammat Dasodha was a minor, and was represented in the Court of first instance by a guardian *ad litem.* The suit was dismissed. The plaintiff appealed, but did not implead the guardian *ad litem.* When the mistake was discovered an application was made to the High Court to rectify the mistake; but this was not done until after the period of limitation for the appeal had expired. At the hearing a preliminary objection was taken by the respondents that the appeal was barred by limitation.

Mr. *W. Wallach*, the Hon'ble Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Moti Lal Nehru* and Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J., and BURKITT, J.—Mr. *Moti Lal* for the respondents raised a preliminary objection to the hearing of this

*First Appeal No. 190 of 1905 from a decree of Nihal Chandra, Subordinate Judge of Saharanpur, dated the 26th of April 1905.

(1) (1881) I. L. R., 4 All., 37.

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appeal, namely, that it is barred by limitation. The defendant respondent to the suit, Musammat Dasodha, is a minor and was represented in the Court below by a guardian *ad litem*. In the memorandum of appeal which was filed the guardian *ad litem* was not made a party to the appeal. This it is said was due to the fact that in the copy of the decree which was furnished to the appellants the fact that there was a guardian *ad litem* was not stated. The memorandum of appeal was filed within time, but the application which was subsequently made to add the name of the guardian *ad litem* to the record was made some months after the expiry of the time allowed for the presentation of the appeal. It is now said that the appeal was not complete until the guardian *ad litem* was added, and that when that was done the appeal was barred by the Statute of Limitation. It has been decided in a case in this Court, namely, the case of *Khem Karan* v. *Har Dayal* (1) that a suit may be brought against a minor before a guardian has been appointed and that limitation runs from the date of the plaint and not from the appointment of the guardian. We think that a memorandum of appeal should be governed by the same considerations. We may point out that a guardian *ad litem* is not a party to a suit or appeal. He is merely named in the record as the person appointed by the Court to look after the interest of the minor. We think that the memorandum of appeal was filed within time, and that there is no substance in the objection. We therefore disallow the objection.

We now come to the merits of the appeal. The plaintiff, Rup Chand, who is a grandson of one Narain Das, deceased, brought the suit out of which the appeal has arisen for a declaration that he and his uncle Hardwari Lal were beneficially entitled to all the ancestral property derived from Narain Das, on the allegation that the descendants of Narain Das formed a joint Hindu family, and that he, the plaintiff, and Hardwari Lal as the surviving male members of that family were now entitled absolutely to the entire property. The defendant Musammat Dasodha is the widow of Lalu Mal, deceased, who was a great-grandson of Narain Das. She claimed through her husband a life interest in one-fourth of the property of Narain Das. The parol

(1) (1881) I. L. R., 4 All., 37.

evidence which was given in support of Musammat Dasodha's case was extremely unsatisfactory, in fact so weak as to be almost worthless, but a number of documents were adduced in evidence which satisfied the learned Subordinate Judge that prior to and at the death of Lalu Mal in July 1903, the family had ceased to be joint. We think it unnecessary to refer particularly to these documents. In the lengthy judgment of the Subordinate Judge they are referred to, but we may point out that one or two of these seem to form an insurmountable barrier to the granting of the relief which the plaintiff seeks. On the 30th of June 1902, a document which is called a deed of compromise was prepared between Musammat Gomi as the certificated guardian of Musammat Dasodha, the widow of Lalu Mal, which is signed by Hardwari Mal and also by Kedar Nath, a grandson of Narain Das, in which the ancestral property was divided between the members of the family. Now the plaintiff Rup Chand was no party to this instrument, but we find that shortly after its execution, namely, on the 5th of July 1902, he executed a bond in favour of a creditor in which he hypothecated one-fourth of the property describing himself as being the owner of one-fourth. In that bond he gives an assurance to his creditor that he was the absolute owner of the one-fourth, without the participation of anyone else. A similar bond was executed by him on the 25th March 1903. In view of these documents, which are supported by a number of other documents to which we have not been particularly referred, we think that the family was not joint at the date of their execution and that the Court below could not have come to any other conclusion than that at which it arrived. We dismiss the appeal with costs.

Appeal dismissed.

1907
November 25.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

DHANKA (PLAINTIFF) *v.* UMRAO SINGH (DEFENDANT).*

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 201— *Act No. I of* 1872 (*Indian Evidence Act*), *section* 4—*Evidence—Presumption—Record of plaintiff's name as a co-sharer.*

Held that the presumption enjoined by section 201, clause (3) of the Agra Tenancy Act, 1901, is not conclusive, but may be rebutted by evidence offered to the contrary. *Banwari Lal* v. *Niadar* (1) referred to.

THIS was a suit for profits brought by a plaintiff, who was recorded in the khewat as the owner of one-third of the property in respect of which the claim was brought. The plaintiff was the widow of Beni Ram, who predeceased his father Ram Prasad. The defendant Umrao Singh was a surviving son of Ram Prasad. The plaintiff appears to have been in possession and in receipt of the profits without objection on the part of the persons legally entitled down to the year 1900. In that year, however, Umrao Singh brought a suit against the plaintiff for a declaration that she was not entitled to a share of the profits of this property. This suit resulted in a compromise, by which Umrao Singh agreed to pay Musammat Dhanka Rs. 10 per mensem and undertook not to alienate the property during Dhanka's life-time. The compromise, however, does not appear to have been acted upon, for even after it was entered into Musammat Dhanka sued for and obtained decrees for profits, nor was the khewat amended in accordance with the terms of the compromise. The present suit was decreed in part by the court of first instance (Assistant Collector), but on appeal the lower appellate court (District Judge of Bareilly) finding on the evidence that the plaintiff's name was recorded merely *solatü causâ*, and that she was not in fact a co-sharer, allowed the appeal and dismissed the plaintiff's suit. The plaintiff appealed to the High Court. This appeal came before a Division Bench, the members of which differed as to the effect to be given to section 201, cl. (3), of the Agra Tenancy Act, 1901, and the decree accordingly followed the judgment of Knox, J., who agreed with the court below (*See* Weekly Notes, 1907, page 43). The plaintiff thereupon appealed under section 10 of the Letters Patent.

* Appeal No. 18 of 1907 under section 10 of the Letters Patent, from the judgment of Knox, J, dated the 8th January 1907, in S. A. No. 1090 of 1905.

(1) (1906) I. L. R., 29 All., 158.

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should be considered conclusive pr[illegible]ed that certain entry it was careful to make a pro[illegible] effect. [illegible] Hindu whole we see no reason for giving [illegible]veness to a presumption where the Legislature has not in [illegible]press terms done so. We are supported in this view by the ruling in the case of *Banwari Lal* v. *Niadar* (1). We therefore, agreeing with our brother Knox, dismiss the appeal with costs.

Appeal dismissed.

December 2.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

ERROR *v.* KASHI NATH AND ANOTHER. *

[illegible] *(Gambling Act), se[illegible]tions 5 and 6—Warrant for search* [illegible] *[illegible]nation"—Procedure—Endorsement* [illegible] *hous[illegible] to whom it was issued.*

Warrants issued under Act No. III of 1867 are governed by those provisions of the Code of Criminal Procedure which provide for the issue and execution of warrants in general: there is, therefore, no objection to the officer to whom such a warrant is originally issued endorsing it to another officer, provided that the latter is an officer to whom such warrant could be legally issued in the first instance.

IN this case a Magistrate of the district of Benares, having before him information of various kinds tending to the conclusion that a certain house in the city of Benares was used as a common gaming house by two persons named Kashi Nath and Raj Nath, issued a warrant under section 5 of Act No. III of 1867 for the search of the suspected house. The warrant was addressed to the Kotwal of Benares. The Kotwal endorsed it over to the Sub-Inspector of the Chauk thana for execution, and it was executed by that officer. On entering the house a large collection of persons of very various castes was found there, apparently gambling, and in front of Kashi Nath and Raj Nath was a box containing money. Kashi Nath and Raj Nath were convicted under section 3 of Act No. III of 1867, and sentenced to three months' rigorous imprisonment each. Against their convictions and sentences they applied in revision to the High Court.

* Criminal Revision No. 622 of 1907, against the order of Baij Nath, Sessions Judge of Benares, dated the 17th of September, 1907.

(1) (1906) I. L. R., 29 All., 158.

Dr. *Sat*[illegible]*ji*, for the appellant.

Babu *Sital* [illegible], for the respondent.

STANLEY, C.J., [illegible]RKITT, J.—The question in this appeal is whether the [illegible]s "shall presume," in sub-section (3) of section 201 of the Tenancy Act, No. II of 1901, should be construed in their ordinary sense or as meaning "shall conclusively presume." If the latter meaning is to be put upon the language, a plaintiff who is recorded proprietor would be entitled to a decree in the Revenue Court as a matter of course. The question is by no means free from difficulty. A presumption of law is merely an arbitrary inference which the law directs judge [illegible] from particular facts, and which may be either conclusive or rebuttable. It is ordinarily rebuttable. The words "shall presume" when used in the Evidence Act mean [illegible] Court shall regard a fact [illegible] until it is disproved. On the other hand, when one fact is declared by that Act to be conclusive proof of another, on proof of the one fact the Court is to regard the other as proved and must not allow evidence to be given for the purpose of disproving it (section 4). If the words "shall presume" bear the same meaning in the Tenancy Act, as they do in the Evidence Act, then the fact that a plaintiff is the recorded owner is only *primâ facie* proof which shifts the burden of proof to the defendant, who may, if he can, by evidence overbear the *primâ facie* proof. Is there any grave reason for interpreting the words "shall presume" as equivalent to the words "shall conclusively presume?" It appears to us that there is no such reason either on the ground of convenience or any like matter to attach to them any other than their ordinary meaning. Indeed to do so might create much inconvenience: for example, in this Province on the death of a proprietor leaving a widow and a son or sons, the widow is very commonly recorded as owner for the sake, as it is said, of consolation. In such a case it would be highly inconvenient if the Revenue Court were not allowed to go behind the record and ascertain the true state of the case. If the Legislature had intended that the presumption should be conclusive, it could easily have so provided. We find in section 19 of the Act that when the Legislature desired to provide that an entry in the khewat

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v.
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pointed out by the Sessions Judge, and further, a large body of some thirty men who were found in the house in question, consisting, as that body did, of Brahmans, Ahirs, Sonars, Banias, Bharbunjas, common cultivators, shopkeepers, Manihars, and Kayasthas, points to the conclusion that they met for the purpose of gambling. I attach great significance to this fact also that a box was found containing money, and that the box was found under the feet of Kashi Nath and Raj Nath; so far as my experience goes it is a fair inference that the money which that box contained was for the benefit of the owners of the house.

Nor do I think that there is much force in the other contention. The learned counsel who appears for the accused argued that the warrant was one that was issued, not under the Code of Criminal Procedure, but under Act No. III of 1867, and so it could not have been passed on by the officer to whom it was granted to another officer. I, however, find nothing in Act No. III of 1867, which would prevent the passing on of the warrant to another officer, provided always that such latter officer was not of a rank below the rank authorized under the Act to enter and search. It is not contended that the officer who executed the warrant was below the rank of officer who could execute a warrant under Act No. III 1867. That Act empowers a Magistrate to authorize any police officer not below the rank of a Sub-Inspector of Police to enter and search a house. There is no provision requiring the Magistrate to mark by name the particular officer who is to execute the warrant. The view I take is that warrants issued under Act No. III of 1867 are governed by those provisions of the Code of Criminal Procedure which provide for the issue and execution of warrants in general. In that case there arises no such difficulty as that raised in the present case; the Code does authorize a warrant being passed on to another officer for execution. I dismiss the application.

Mr. *C. C. Dillon*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

KNOX, J.—Kashi Nath and Raj Nath have been convicted of an offence under section 3 of Act No. III of 1867. They appealed from their conviction to the Court of Session at Benares. The conviction was upheld, but the sentence modified. The case has come before me in revision, and I am asked to interfere with the conviction and sentence on the ground that owing to the Kotwal of Benares having endorsed a search warrant addressed to him under section 5 of Act No. III of 1867 to another police officer, the warrant so executed was illegal, and the entry and search of the house in question were not such as to give rise to the presumption contained in section 6 of Act No. III of 1867. It is further contended that the record does not show that the Magistrate who granted the warrant acted on credible information, and if so he had no jurisdiction to grant the warrant. From this it would follow that the police officer acted illegally in entering and searching the house, with the further result, again, that the presumption authorized by section 6 could not be entertained by the Court. The warrant on the face of it contains an entry to the effect that the Magistrate acted on credible information; but it is contended that it is a printed form and that the accused has a right to demand that there should be on the record some material, which the appellate or revisional Court can see, and from which it can judge whether the information was in fact credible. In the present case I will not enter into this point, for I find, looking into the judgment of the appellate Court that the Magistrate who issued the warrant had a good deal of information from which he was authorized to issue the warrant that he did issue. Reference was made to several cases, namely, *Queen-Empress* v. *Ram Bharose* (1), *Queen-Empress* v. *Chiranji* (2) and *Queen-Empress* v. *Yusuf Husain* (3). All these deal with what should be deemed credible information. As is pointed out in *Emperor* v. *Abdul Samad* (4), the meaning of the words "credible information" must in each case depend on its own circumstances. In the present case numerous circumstances have been

(1) Weekly Notes, 1890, p. 226.
(2) Weekly Notes, 1891, p. 111.
(3) Weekly Notes, 1889, p. 162.
(4) (1905) I. L. R., 28 All., 210.

APPELLATE CIVIL.

1907
December 4.

Before Mr. Justice Banerji and Mr. Justice Richards.

MEGHAN DUBE AND ANOTHER (DEFENDANTS) *v.* PRAN SINGH AND OTHERS (PLAINTIFFS).*

Hindu law—Joint Hindu family—Mortgage executed in name of minor—Act No. IX of 1872 *(Indian Contract Act), section* 11—*Civil Procedure Code, section* 562—*"Preliminary point."*

A mortgage in favour of a joint Hindu family is not void because it happens to be executed in the name of a member of the family who at the time of execution is a minor. *Mohori Bibee* v. *Dharmodas Ghose* (1) distinguished.

Held also that the decision of an issue as to whether or not the document which formed the basis of the suit was void in consequence of its having been executed in favour of a minor was a decision on a preliminary point, such as justified a remand under section 562 of the Code of Civil Procedure. *Mata Din* v. *Jamna Das*, (2) followed.

THE facts of this case are as follows:—

The suit was brought by two plaintiffs, who alleged that the defendants Nos. 4 and 5 executed in their favour a usufructuary mortgage on the 4th of June 1893 and put them in possession of the mortgaged property; that the mortgagors subsequently executed another mortgage of the same property in favour of the defendants Nos. 1 to 3 on the 17th of July 1898, and that the subsequent mortgagees dispossessed the plaintiffs. The plaintiffs stated that they were father and son and formed a joint family, and that the mortgage was obtained in the name of one of them who, it is admitted, was on the date of the mortgage a minor. The plaintiffs claimed possession of a portion of the mortgaged property from which they alleged they had been dispossessed and they also claimed damages. In the alternative they asked for a decree for the mortgage money. The suit was defended by the first three defendants, the subsequent mortgagees, who denied that the mortgage set up by the plaintiffs had been executed in their favour. They further denied that the plaintiffs were ever in possession, and pleaded limitation. They also put forward other pleas, to which it is unnecessary to refer for the purposes of

* First Appeal No. 10 of 1907, from an order of Sri Lal, District Judge of Ghazipur, dated the 3rd of August 1906.

(1) (1902) I. L. R., 30 Calc., 539. (2) (1905) I. L. R., 27 All., 691.

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this report. The Court of first instance (Munsif of Ballia) dismissed the claim, holding that the mortgage had not been proved, that even if the mortgage-deed was executed, it was without consideration, and that the claim was time-barred. That Court also found that the mortgage in suit was void as having been executed in favour of a minor. On appeal the lower appellate Court (District Judge of Ghazipur) framed two issues—(1) whether the mortgage-deed in question was executed without consideration, and (2) whether the plaintiffs' suit was barred by limitation. On both these points, as also upon the third question decided by the Court below, the lower appellate Court differed from the Court of first instance. That Court accordingly set aside the decree dismissing the suit and remanded the case under section 562 of the Code of Civil Procedure. From this order of remand the defendants appealed to the High Court.

Munshi *Haribans Sahai*, for the appellants.

Babu *Sital Prasad Ghosh*, for the respondents.

BANERJI and RICHARDS, JJ.—The suit which has given rise to this appeal was brought by two plaintiffs who alleged that the defendants Nos. 4 and 5 executed in their favour a usufructuary mortgage on the 4th of June 1893 and put them in possession of the mortgaged property; that the mortgagors subsequently executed another mortgage of the same property in favour of the defendants Nos. 1 to 3 on the 17th of July 1898, and that the subsequent mortgagees dispossessed the plaintiffs. The plaintiffs stated that they were father and son and formed a joint family, and that the mortgage was obtained in the name of one of them, who, it is admitted, was on the date of the mortgage a minor. The plaintiffs claimed possession of a portion of the mortgaged property from which they alleged they had been dispossessed and they also claimed damages. In the alternative they asked for a decree for the mortgage money. The suit was defended by the first three defendants, the subsequent mortgagees, who denied that the mortgage set up by the plaintiffs had been executed in their favour. They further denied that the plaintiffs were ever in possession, and pleaded limitation. They also put forward other pleas, to which it is unnecessary to refer for the purposes of this appeal. The Court of first instance dismissed

the claim, holding that the mortgage had not been proved, that even if the mortgage deed was executed, it was without consideration, and that the claim was time-barred. On appeal the lower appellate Court framed two issues—(1) whether the mortgage deed in question was executed without consideration, and (2) whether the plaintiffs' suit was barred by limitation. On both these points the Court found in favour of the plaintiffs. The Court of first instance had dismissed the suit on the further ground that the contract of mortgage which was in favour of a minor was void. On this point the lower appellate Court differed from the Court of first instance and held that the ruling of the Privy Council in the case of *Mohori Bibee* v. *Dharmodas Ghose* (1), on which the first Court had relied, was not applicable. The appellate Court accordingly remanded the case to the Court of first instance under section 562 of the Code of Civil Procedure for trial of the other issues which arose in the case, but which had not been determined by the first Court in view of its findings on the issues to which we have referred. From this order of remand the present appeal has been preferred. The first plea raised on behalf of the appellants is that the contract on which the suit is based is void, inasmuch as the mortgagee was a minor at the date of the execution of the mortgage deed. The learned vakil for the appellants relies upon the ruling of the Privy Council referred to above, upon which the Court of first instance had based one of its conclusions. That was a case in which their Lordships of the Privy Council held that a contract made by a minor was absolutely void and not merely voidable. That, however, is not the case here. The contract in this case was made by persons of full age, but the person in whose favour the mortgage deed was executed was a minor. The question of the validity of the mortgage does not in our opinion arise. It was alleged in the plaint that both the plaintiffs were members of a joint family; that the mortgage was made in favour of that family, and that the mortgage deed was executed in the name of one of the members only. There was no specific denial of these allegations by the defendants and the case proceeded on the basis of their correctness. This was therefore a case of a mortgage

(1) (1902) I. L. R., 30 Calc., 539.

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in favour of a joint family and not of a minor. We may also observe that the defendants did not raise the plea in their written statement that the contract was void. That being so, we think there is no force in the first plea taken in the memorandum of appeal.

It is next urged that the Court below ought not to have remanded the case under section 562 of the Code of Civil Procedure, because the Court of first instance has not decided the suit upon a preliminary point. We think the ruling in *Mata Din* v. *Jamna Das* (1), on which the Court below relies, is applicable to the case, and justifies the action of that Court, specially as no new issues have to be framed, but only such of the issues as the first Court left entirely undecided are now to be determined. We dismiss the appeal with costs.

Appeal dismissed.

1907
December 5

FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Richards.

IN THE MATTER OF THE PETITION OF ANANT RAM AND OTHERS.*

Criminal Procedure Code, section 4 (r)—Act No. XVIII of 1879 (Legal Practitioners Act), section 9 — Mukhtars — Authority of Mukhtar to practice in Criminal Courts.

A mukhtar is not entitled to practise generally and as of right in Criminal Courts, but can act only when he has received the permission of the Court to act in any particular proceeding.

THIS was an application by certain mukhtars practising within the limits of the Meerut Sessions Division asking that an order issued by the District Magistrate of Muzaffarnagar for the guidance of Subordinate Magistrates in that district, and based upon certain remarks made in an appellate judgment by the Additional Sessions Judge of Meerut, might be set aside. The District Magistrate's order as well as the passage in the Additional Sessions Judge's judgment upon which it was founded are quoted below in the order of Knox, J.

Mr. *C. C. Dillon*, in support of the application, contended that it was not necessary for a mukhtar who had obtained a

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* Miscellaneous No. 69 of 1907.

(1) (1905) I. L. R., 27 All., 691.

certificate from the High Court entitling him to practise to obtain permission from the Court concerned in respect of each case in which he wished to appear. The word 'mukhtar' in section 4(*r*) of the Code of Criminal Procedure meant a mukhtar who had not obtained such a certificate. Such persons only had to obtain permission before they could appear; but the section did not contemplate mukhtars who had obtained a certificate under the Legal Practitioners Act. He referred to *Imperatrix* v. *Sheo Ram Gundoo* (1).

Mr. *A. E. Ryves*, (as *amicus curiæ*) in support of the order of the Magistrate, submitted that mukhtars could not rank with pleaders. In the draft of the present Code of Criminal Procedure the classing of mukhtars with pleaders was at one time contemplated, but the bill when passed was altered. This indicated that mukhtars must obtain permission from the Court in respect of each case individually. They could not oust a more highly qualified class of men, namely, the vakils and pleaders. There was no order prohibiting mukhtars from practising, nor was there any allegation that any specified mukhtar had been refused permission to appear. The order was perfectly legal and not a subject for revision.

KNOX, J.—The Additional Sessions Judge of Meerut in an appeal pending before him entered in his judgment the following observation:—"All accused persons are of right entitled to be defended by a pleader and the definition of 'pleader' in the Criminal Procedure Code does not include mukhtars; special permission of the Court has to be obtained for the representation of an accused person by other than a pleader; but Magistrates seem to take it as a matter of course that mukhtars should appear. While this is so, the standard of morals in the Courts can never improve. I dismiss this appeal and order that a copy of this judgment be sent to the District Magistrate for information." Upon receipt of this the District Magistrate of Muzaffarnagar issued the following order:—"Mukhtars can appear under section 4 (*r*) (1) only with the Court's permission. Draw all Courts' attention to this section."

(1) (1881) I. L. R. 6, Bom., 14.

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IN THE MATTER OF THE PETITION OF ANANT RAM.

It is contended before us that both these orders, namely, the order of the Additional Sessions Judge of Meerut and the order of the District Magistrate of Muzaffarnagar, were made without jurisdiction. This contention is raised by certain mukhtars of the Muzaffarnagar district, who are represented in this Court by learned counsel. The learned counsel in opening his case boldly claimed for his clients the right to appear whether with or without permission in Criminal Courts. His argument was that the words contained in the clause of the Code of Criminal Procedure quoted above did not refer to a mukhtar who has obtained a certificate from this Court authorizing him to practise in Criminal Subordinate Courts. He wished us to read the words "appointed with the permission of the Court to act in such proceeding" as qualifying the immediately preceding words "other persons" and as not referring or qualifying the words "any mukhtar." In the first place, if that had been the intention of the Legislature, we should have expected to find words "any mukhtar" placed in group (1), clause (*r*), and not, as they are, in group (2) of that clause. There is a still further difficulty which is an insuperable one, and that arises out of the provisions of section 9 of Act No. XVIII of 1879. This section defines the powers given to mukhtars on enrolment and provides that a person so enrolled "may practise as a mukhtar in any such Civil Court and any Court subordinate thereto and may, subject to the provisions of the Code of Criminal Procedure, 1882, appear, plead and act in any such Criminal Court and any Court subordinate thereto." The language here used shows that the Legislature intended to draw, and did draw, a distinction between the privileges of a mukhtar when practising in a Civil Court and his privileges when practising in a Criminal Court. In the latter case those privileges are subject to the provisions of the Code of Criminal Procedure, 1882, that is to say, including and in addition to other provisions, the provision that he can only act when he has received the permission of the Court to act in a particular proceeding. The history of the genesis of this provision in clause (*r*) confirms the view we take of the intention of the Legislature. The learned Government Advocate pointed out that when Act No. V of 1898 was still in the stage of a bill and before the Legislative Council, the draft

proposed to confer upon mukhtars the very privileges which are contended for here. But when the bill passed into law, the provisions which had prevailed under Act No. X of 1882 were replaced in Act No. V of 1898 without any change. All that the learned Additional Sessions Judge has done in his judgment is to draw the attention of the Magistrate subordinate to him to clause (*r*) of section 4 of Act No. V of 1898 intimating that these provisions apply to mukhtars holding certificates. The District Magistrate has done nothing more than to draw the attention of the subordinate Courts to the subject. We cannot say that in either order the Courts concerned acted without jurisdiction or contrary to law.

BANERJI, J.—I entirely agree. At the same time I am of opinion that if permission to act in a criminal case be asked for by a mukhtar who holds a certificate empowering him to practise in Criminal Courts, such permission should not be refused except for valid reasons and having regard to the circumstances of the particular case and of the particular mukhtar who applies for permission.

RICHARDS, J.—I also agree in what has been said by Sir George Knox and Mr. Justice Banerji. I think, in considering whether or not permission should be granted to a mukhtar who has qualified himself with the certificate provided by the Legal Practitioners Act, the Court ought to consider every application on its merits. Mukhtars cannot expect or claim all the privileges of vakils and advocates who have had to qualify themselves after much study and expense. This is what is really claimed on behalf of the present applicants. On the other hand there must be many occasions when the difficulty of obtaining the services of an advocate or pleader will be very great, and perhaps, having regard to the means of an accused person and distance, practically impossible. All these are matters which I think the Court might fairly take into consideration when granting or withholding permission to a mukhtar holding the certificate mentioned in the Legal Practitioners Act XVIII of 1879.

1907
December 6.

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

MUNICIPAL BOARD OF BULANDSHAHR (DEFENDANT) *v.* DAKKHAN LAL (PLAINTIFF).*

Act (Local) No. I of 1900 (*United Provinces Municipalities Act*), *section* 3 (4)—*Definition*—"*Street.*"

Held **that a lane which, though at one time private property, had been for upwards of thirty years used by the public generally and had been lighted, drained and swept by the Municipality, was a "street" within the meaning of section 3 of the Municipalities Act, 1900, and was not the less a street because it happened to be a cul-de-sac.**

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Ghulam Mujtaba* and Babu *Lalit Mohan Banerji*, for the appellant.

Lala *Girdhari Lal Agarwala*, for the respondent.

KNOX and AIKMAN, JJ.—The plaintiff, Dakkhan Lal, who is respondent to this second appeal, was the owner of a house which is situate in one of the inner lanes in the town of Bulandshahr. One end of the lane is closed, in other words the lane is a cul-de-sac. In front of his house he erected some cattle troughs and a thatched shed. Complaint was made by some of the residents of the mohalla living opposite the plaintiff's house. This complaint was made to the Municipal Board, and they served the plaintiff with a notice to remove the constructions which he had made, on the ground that they caused inconvenience to the people of the mohalla and also injuriously affected the sanitation of the place. The plaintiff filed objections, which were overruled by the Board, and he was ordered peremptorily to remove the troughs and the thatch. He failed to comply with this order, was prosecuted, admitted that he was wrong, was fined, and he himself pulled down the erections that he had made. He then instituted the suit out of which this appeal has arisen. He prayed for a declaration that the land upon which he had built was his own land and for an injunction to restrain the Municipality from interfering any further with it. He also prayed that the Municipality should

* Second Appeal No. 349 of 1906, from a decree of Girraj Kishore Dat, Additional Subordinate Judge of Aligarh, dated the 1st of February 1906, modifying a decree of Mubarak Husain, Munsif of Bulandshahr, dated the 24th of July 1905.

be ordered to rebuild the erections or to pay damages. The Court of first instance came to the conclusion that the land upon which the plaintiff had built, was his own private property and that he had not by the building that he had made encroached upon any street. It therefore held that the provisions of section 88, sub-section (1) of the North-Western Provinces and Oudh Municipalities Act, I of 1900, did not apply and that the Municipality was not justified under that section in the order which they had issued, but he held that they were in issuing the order justified by section 87 of the same Act. Whilst therefore he gave the plaintiff the declaration he asked for, he dismissed the rest of the claim. The plaintiff appealed. The learned Subordinate Judge allowed the appeal and decreed the plaintiff's claim in full. The Municipal Board has come here in second appeal.

The case has been well argued before us by the learned vakils on both sides. They have taken us through the judgments and cited various authorities applicable to the question at issue. For the appellant it is contended that, accepting the findings of fact arrived at by the Court below, the conclusion of the learned Subordinate Judge to the effect that the lane was not a street as defined by the Municipalities Act was wrong. The word "street" as used in the Act, is defined in clause (4), section 3, as follows:— "Street means any street, road, thoroughfare, passage or place over which the public have a right of way, and includes the footway and surface drains of any such street, and any bridge, culvert or causeway forming part of any such street."

We have to consider whether on the facts found the place where the plaintiff made his constructions, is a place abutting or adjoining a street within the meaning of this Act. We would first observe that the fact that the lane is a cul-de-sac does not prevent it from coming within definition of street, so long as the public have a right of way over it. It appears from the evidence that upwards of thirty years ago a Deputy Collector named Tonochy was the owner of this property and that he erected houses and shops thereon. After his death the houses and shops together with some land were sold by auction to different persons. The map shows that these houses and shops are situate on both sides of the lane, which is closed at the north end, and that there are shops in the lane nearer the

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closed end than the plaintiff's house. There are also shops near the open end. This lane has been lighted and drained and is swept by the Municipality. When the Tonochy property was sold, the portion which forms this lane was not sold and has been freely used by the public for at least thirty years. Taking all the facts into consideration, we think the conclusion to be drawn from them when viewed together is that the lane is a public street as defined in the Act. This being so, the Municipality were acting within their rights in passing the order complained of. For the above reasons we allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

1907 *December 6.*

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

SHEO NARAIN (DEFENDANT) *v.* NUR MUHAMMAD AND ANOTHER (PLAINTIFFS). *

Civil Procedure Code, section 244—Execution of decree—Purchase at auction-sale by decree-holder—Suit by decree-holder to obtain possession of property so purchased.

Where the decree-holder himself purchases property at auction sale in execution of his own decree, but fails to obtain possession, his remedy is by application under section 244 of the Code of Civil Procedure: he cannot bring a separate suit for possession. *Seru Mohan Bania* v. *Bhagoban Din Pande* (1) and *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (2) distinguished. *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (3), *Kattayat Pathumayi* v. *Raman Menon* (4) and *Kalian Singh* v. *Thakur Das* (5) followed. *Prosunno Coomar Sanyal* v. *Kali Das Sanyal* (6) referred to.

THE predecessors in title of the plaintiffs were purchasers of a 4-anna zamindari share owned by one Param in execution of a simple money decree held by one of them. The purchase was made on the 20th of April 1895.

In February 1902 the plaintiffs applied under section 318 to be put into possession of the property purchased, but their application was rejected on the 1st of March 1902 as beyond time.

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* Appeal No. 36 of 1907 under section 10 of the Letters Patent, from the judgment of Aikman, J., in S. A. No. 521 of 1905, dated the 5th of April 1907.

(1) (1883) I. L. R., 9 Calc., 602.
(2) (1887) I. L. R., 14 Calc., 644.
(3) (1899) I. L. R., 27 Calc., 34.
(4) (1902) I. L. R., 26 Mad., 740.
(5) Weekly Notes, 1906, p. 87.
(6) (1892) L. R., 19 I. A., 169.

Thereafter, on the 18th of July 1904, the plaintiffs instituted the present suit to recover possession of the property purchased by their predecessor in title on the 20th April 1895, as above stated. The Court of first instance (Munsif of Lalitpur) dismissed the plaintiffs' suit. On appeal, however, the District Judge of Jhansi reversed the Munsif's decree, allowed the appeal, and decreed the plaintiffs' claim. The defendant appealed to the High Court. The appeal came on for hearing before a single Judge of the Court and was dismissed—*Cf.* Weekly Notes, 1907, p. 131. The defendant thereupon appealed under section 10 of the Letters Patent.

Mr. *G. W. Dillon* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The main question raised in this appeal is whether a claim for possession of property purchased by a decree-holder in execution of his own decree can be enforced by a separate suit, or whether such a suit is barred by the provisions of section 244 of the Code of Civil Procedure. The property of which possession is sought to be recovered falls a little short of a 4-anna undivided share of a certain village which was purchased by the decree-holders on the 20th of April 1895. That property is in the possession of the appellant Sheo Narain under a deed of gift from the widow of the judgment-debtor. No steps were taken by the purchaser to obtain possession until the month of February 1902, that is, nearly seven years after the date of the purchase, when he applied to the Court for possession under section 318 of the Code. That application was rejected as being barred by limitation on the 1st of November 1902. The present suit was instituted in 1904 for a declaration that the share of the property in question was not subject to a mortgage which had been set up in a prior suit by Sheo Narain and also for possession of it as unincumbered property.

The Court of first instance dismissed the plaintiffs' claim, holding that the share in question was not unincumbered and relying in support of his decision upon the memorandum of bids which was prepared by an Amin in the office of the Deputy Collector, from which it appeared that the property sold was

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subject to a mortgage for a sum of Rs. 148. On appeal the decision of the Court of first instance was reversed, and thereupon a second appeal was preferred to this Court. The learned Judge before whom the appeal came upheld the decision of the lower appellate Court, holding that there was no force in the contention raised on behalf of the appellant in that Court, that the suit was barred by the provisions of section 244 of the Civil Procedure Code. He observes in the course of his judgment:—"The mere fact that the auction purchasers or their representatives failed to apply within time to be put in possession under section 318 of the Code of Civil Procedure does not deprive them of their right to bring a regular suit" and then quotes as an authority for this view the case of *Seru Mohan Bania* v. *Bhagoban Din Pande* (1) and *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (2). In neither of these cases was the purchaser the decree-holder, as was the fact in the case before us. But there is no doubt that according to some early rulings the decision of the learned Judge would have been correct. Lately, however, several cases have come before this and the other High Courts in which the early rulings have not been followed. The earliest of these to which we need refer is the case of *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (3), in which it was held by Macpherson and Stevens, JJ., that proceedings for the delivery of possession to an auction purchaser, who was also the decree-holder, after sale in execution of her own decree, were proceedings in execution of the decree, and that when application for possession was resisted by the legal representative of the judgment-debtor on the allegation that portions of the property belonged to him and not to the judgment-debtor, the question raised came under section 244 and must be decided under that section and not by a separate suit. The next case to which we would refer is that of *Kattayat Pathumayi* v. *Raman Menon* (4), in which a similar view was taken, it being held that proceedings taken by an auction purchaser to obtain possession of property purchased by him at a sale in execution of his own decree related to the execution, discharge or satisfaction of the decree within the

(1) (1883) I. L. R., 9 Calc., 602.
(2) (1887) I. L. R. 14 Calc., 644.
(3) (1899) I. L. R., 27 Calc., 34.
(4) (1902) I. L. R., 26 Mad., 740.

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meaning of section 244 and that a separate suit for possession was not maintainable. The question again came before this Bench in the case of *Kalyan Singh* v. *Thakur Das* (1), in which the question was carefully considered and the decision of the Calcutta and Madras High Courts was followed. So far therefore as we are concerned the question is concluded by authority. We do not think that we are unduly extending the scope of section 244, and we say this with the more confidence, in view of the observations of their Lordships of the Privy Council in recent cases as regards the object and meaning of that section, in which they express approval of the facts that the Courts in India have not placed any narrow construction on its language:—see *Prosunno Coomar Sanyal* v. *Kali Das Sanyal* (2).

For these reasons we must allow the appeal and dismiss the suit with costs in all Courts.

Appeal decreed.

1907
December 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

MAHADEI (PLAINTIFF) *v.* BALDEO (DEFENDANT).*

Hindu law—Hindu widow—Effect of compromise entered into by a Hindu female with a limited estate.

Held that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding on the reversioners, even though it has been followed by a decree of Court; the reversioners can only be bound by a decree made after a full contest in a *bonâ fide* litigation. *Gobind Krishna Narain* v. *Khunni Lal* (3) followed.

THIS was a suit to recover possession of certain zamindari property of small value, and was brought under the following circumstances. The property originally belonged to one Dayal, who died leaving a widow Musammat Anandi, a son Suraj Din and a daughter Sukhdei. Suraj Din succeeded to the property. On Suraj Din's death his widow, Musammat Batasia, took

* Appeal No. 35 of 1907 under section 10 of the Letters Patent from the judgment of Aikman, J., in Second Appeal No. 228 of 1906, dated the 16th of May 1907.

(1) Weekly Notes, 1906, p. 87. (2) (1902) 19 I. A., 169; s. c., I. L. R., 19 Calc., 683.

(3) (1907) I. L. R., 29 All., 487.

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possession of the whole estate. A suit was instituted against her by Musammat Anandi for a share in the estate. On the 26th of November 1898 Batasia and Anandi compromised the suit, and in terms of the compromise Anandi got a one-third share of the property. On Batasia's death on the 24th of January 1905, her daughter Musammat Mahadei brought the present suit to recover possession of the one-third share which had been made over to Anandi. The defendants to the suit were Musammat Anandi and Baldeo, a daughter's son of Musammat Anandi, to whom the latter is said to have made over the share by gift. The Court of first instance (Munsif of Allahabad) held that the plaintiff was not entitled to recover possession of the share whilst Anandi lived. It left it an open question as to whether the plaintiff would be entitled to get the share on Anandi's death. On appeal the lower appellate Court (Subordinate Judge of Allahabad) came to a different conclusion. It held that Musammat Batasia being a Hindu widow had no power to make the transfer, and decreed the plaintiff's claim. The defendants thereupon appealed to the High Court and their appeal coming before a single Judge of the Court was allowed and the decree of the first Court restored, *vide* Weekly Notes, 1907, p. 199. The plaintiff appealed under section 10 of the Letters Patent.

Mr. *W. Wallach* and Munshi *Gobind Prasad*, for the appellant.

Mr. *B. E. O'Conor*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The decision of the learned Judge of this Court against which this appeal is preferred is wholly opposed to the principle laid down in a judgment of a Division Bench of this Court in the case of *Gobind Krishna Narain* v. *Khunni Lal* (1). In that case the Court held, following earlier rulings and citing the leading case of *Stapilton* v. *Stapilton* (2), that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding on the reversioners, even though it has been followed by a decree of Court, and that the reversioners can only be bound by a decree made after a full contest in a *bonâ fide* litigation. This case was not reported until the

(1) (1907) I. L. R., 29 All., 487. (2) (1739) 1 W. and T., 230.

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20th of May 1907, and does not appear to have been brought to the notice of the learned Judge. The fact that the property involved is of little value is a matter which cannot be taken into consideration in determining the rights of the parties. In view of the ruling above referred to we must allow the appeal. We set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court with costs in all Courts.

Appeal decreed.

1907
December 13.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BAHAL SINGH AND ANOTHER (PLAINTIFFS) *v.* MUBARIK-UN-NISSA AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Construction of document—"Shurkayan-i-shikmi."

The wajib-ul-arz of a village (Kandhla) in the Muzaffarnagar district gave a right of pre-emption, first to *shikmi* co-sharer (*shurkayan-i-shikmi*), secondly, to share-holders descended from a common ancestor (*shurkayan-i-jaddi*), and thirdly, to *khewatdars* in the mahal (*khewatdaran-i-mahal*). The mahal was divided into seven *pattis* and the land in dispute was situated in *patti* Khail, *thok* Bhuria. The pre-emptors were co-sharers in *patti* Khail. One of the vendees was a co-sharer in the mahal, but not in *patti* Khail *Held* that, regarding the whole context of the wajib-ul-arz, the expression *shurkayan-i-shikmi* was intended to denote relatives by blood and not co-sharers in any sub-division of the mahal, and the plaintiffs were not therefore entitled to pre-emption. *Jeymul* v. *Kesree* (1) and *Abdul Shakur* v. *Mendai* (2) referred to.

THIS was a suit for pre-emption of a zamindari share in mauza Kandhla in the district of Muzaffarnagar. The property in dispute formed part of khewat Nos. 22 and 33, portion of a mahal of 15 biswas. The mahal was divided into seven *pattis*, and the land in dispute was situate in *patti* Khail, *thok* Bhuria. The plaintiffs were co-sharers in *patti* Khail while the defendant Musammat Mubarik-un-nissa was a co-sharer in the mahal, but not in *patti* Khail. In the wajib-ul-arz of the village the persons in whose favour a right of pre-emption was given were classified under three heads :—

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* Second Appeal No. 1077 of 1905, from a decree of L. G. Evans, District Judge of Saharanpur, dated the 22nd of June 1905 reversing a decree of Madho Das, Subordinate Judge of Saharanpur, dated the 1st of September 1904.

(1) Agra, F. B. 1866, p. 171. (2) (1901) I. L. R., 23 All., 260.

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(1) Shikmi share-holders (*shurkayan-i-shikmi*).

(2) Share-holders descended from a common ancestor (*shurkayan-i-jaddi*) and

(3) Khewat-dars in the mahal (*khewatdaran-i-mahal*).

The court of first instance (Subordinate Judge of Saharanpur) held that the plaintiffs had a preferential right of pre-emption and gave them a decree, but on appeal the District Judge reversed this decree, holding that neither the plaintiffs nor the defendants answered the description of *shikmi* share-holders, but came under the third clause as other *khewatdars* in the mahal, and that therefore the plaintiffs had no preferential right of pre-emption as against the defendants. The plaintiffs appealed to the High Court.

Sir *Walter Colvin*, Mr. *M. L. Agarwala* and Babu *Parbati Charan Chatterji*, for the appellants.

Pandit *Moti Lal Nehru*, Mr. *R. Malcomson* and Maulvi *Muhammad Ishaq*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The sole question for determination in this appeal turns upon the meaning to be assigned to the expression "*shikmi*" share-holders used in the wajib-ul-arz of village Kandhla in the Saharanpur judgeship. On the part of the appellant it is contended that the word "*shikmi*" denotes those who are more closely connected with the vendor in a *thok* and *patti* in which the property, the subject of the sale, is situate than proprietors in another *patti* of the same mahal who are not proprietors in such *thok* or *patti*. On the part of the respondents the contention is that the expression *shikmi* share-holders denotes share-holders born of the same *shikam*, that is, uterine brothers or blood relations. The property in dispute formed part of khewat Nos. 22 and 33, portion of a mahal of 15 biswas. The mahal is divided into seven *pattis* and the land in dispute is situate in *patti* Khail, *thok* Bhuria. It is admitted that the plaintiffs appellants are co-sharers in *patti* Khail, while the defendant Musammat Mubarik-un-nissa is a co-sharer in the mahal, but not in *patti* Khail. In the wajib-ul-arz of the village the persons in whose favour a right of pre-emption is given are classified under three heads:—

(1) Shikmi share-holders (*shurkayan-i-shikmi*).

(2) Share-holders descended from a common ancestor (*shurkayan-i-jaddi*) and

(3) Khewatdars in the mahal (*khewatdaran-i-mahal*).

The learned Subordinate Judge held that the plaintiffs had a preferential right of pre-emption and gave them a decree, but on appeal the learned District Judge reversed this decree, holding that neither the plaintiffs nor the defendants answered the description of *shikmi* share-holders, but came under the third clause as other *khewatdars* in the mahal, and that therefore the plaintiffs had no preferential right of pre-emption as against the defendants.

The word "*shikmi*" in connection with co-sharers in land is rarely met with and is a vague and indefinite term. We have been referred to two cases only in which the expression "*shikmi* share-holders," is to be found, and we know of no other. In the case of *Jeymul* v. *Kesree* (1) the construction of a wajib-ul-arz in which the expression "*shikmi shurkayan*" occurred was referred to a Full Bench. In the referring order it is stated that the expression "*shikmi* sharers" was said to have acquired the local meaning of sharers who are blood relations, when these words occur in administration papers in the Saharanpur district, and reference is made to a judgment of the Principal Sadr Amin in which is a statement to the effect that the pleaders on both sides admitted that the phrase *shikmi* sharers expresses no distinct meaning, but that its local meaning is "a sharer who is a blood relation to another sharer." The case was referred to the Full Bench so that a definite rule of construction might be laid down. According to the head-note the Full Bench decided that the proper construction of the words "*shikmi shurkayan*" was that they gave a preference to the sharers in the *thoks* over those who were merely sharers in the village. This head-note is altogether inaccurate, for we find on reference to the judgment that the Full Bench declined to decide what the meaning of the expression was or whether it had a special local meaning. They decided the case upon a later passage in the wajib-ul-arz, which gave to the share-holders in the same *thok* a preferential right of pre-emption over share-holders

(1) Agra. F. B., 1866, p. 171.

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who were merely sharers in the village. This case therefore does not help the appellants.

The other case to which we were referred is that of *Abdul Shakur* v. *Mendai* (1). The wajib-ul-arz which was considered in that case conferred the right of pre-emption on seven classes of persons, each class having a preferential right over the class next following. The first two classes were composed of persons who were related to the vendor, the remaining classes consisted of persons who were co-sharers of the vendor. By reference to the record we find that in the first class came own brothers; in the second class near relations, and in the third *hissadaran shikmi*. In the fourth class came the lambardar of the *behri*, or *patti* and in the fifth a co-sharer in the *patti*, while the sixth and seventh classes were respectively composed of the lambardars and co-sharers in the village. Sir Arthur Strachey, C.J. and Banerji, J., held that the expression "*hissadaran shikmi*" did not necessarily apply to any idea of subordination, but was rightly considered as applicable to persons who were co-sharers in the particular *khata* of the *patti* in which the land sold was situate. In that case it will be noticed that the first two classes exhausted the relations by blood, and it was therefore necessary to attach a meaning to the words "*hissadaran shikmi*" other than that of blood relations. Now, as our Brother Banerji pointed out in his judgment in that case, the various clauses of a wajib-ul-arz are not recorded with as much precision as is desirable, and therefore the intention must be gathered in each case from the whole context and the surrounding circumstances. He referred to the derivation of the word "*shikmi*" and pointed out that its primary meaning was inclusion, but the question is, inclusion in what? If we look to the derivation of the word, we should be disposed to hold that it referred to blood relations, such as uterine brothers, that is, the fruit of the womb, and not to share-holders in a mahal or a sub-division of a mahal.

The contention that the framers of the wajib-ul-arz in this case had blood relationship in view when this expression was used gathers some support from the fact that the second category

(1) (1901) I. L. R., 23 All., 260.

of pre-emptors is composed of share-holders (*shurkayan*) descended from a common ancestor. Relationship by blood rather than propinquity or vicinage would seem to have been in view in determining the priorities of claimants for pre-emption. A sequence of classes according to which share-holders descended from a common ancestor would be interposed between share-holders in a sub-division of the mahal and share-holders in the mahal would not be natural. In the third category the word "*shurkayan*" is not used to denote share-holders, but a different word, namely, "*khewatdar*." If the word "*shikmi*" implies connection with the vendor by reference to inclusion in property in which both are share-holders, it must have reference to a sub-division of the mahal itself, seeing that in the third category come co-sharers in the mahal. To what sub-division of the mahal then would it apply? Is it to co-sharers in the *patti* or in the *thok*, or in the *khata* or a sub-division of the *khata*, and is there a preferential right given to share-holders in each of these sub-divisions, and if so, in what order? If we accept the argument advanced on behalf of the appellants, we must define *shikmi* share-holders as limited to share-holders in the *thok*, or in the *patti*, or in the *khata*, or in the sub-divisions of the *khata*. In other words we should be considerably enlarging the category of pre-emptors. We do not think that this was intended. Regarding the whole context of the wajib-ul-arz, we think that the expression "*shikmi shurkayan*" was intended to denote relatives by blood and not co-sharers in any sub-division of the mahal.

For these reasons we think the learned District Judge rightly dismissed the plaintiffs' suit. We dismiss the appeal with costs.

Appeal dismissed.

1907
December 14.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

NAND KISHORE (PLAINTIFF) *v.* ANWAR HUSAIN AND OTHERS (DEFENDANTS).*

Lease—Condition for payment of rent in advance—Suit by purchaser of demised property for rent—Registration—Notice.

Certain property was leased for a term of 10 years, the lease containing a provision to the effect that if at any time during the currency of the lease the lessor should demand any portion of the rent in advance from the lessee, the latter should be bound to pay it on obtaining a receipt. Subsequently to the execution of this lease the demised property was sold by auction in execution of a decree. The auction purchaser sued the lessee for rent, but was met by the plea that the rent claimed had been paid to the lessor in advance under the terms of the lease. The lease was registered and it was found that the auction purchaser had not made inquiry of either the lessor or the lessee as to whether or not any rent had been paid in advance according to the terms of the lease. *Held* that under these circumstances the plaintiff was not entitled to recover.

THE facts of this case are as follows :—One Sajjad Husain was the owner of certain property at or prior to the year 1898. On the 21st of September of that year he granted a lease to the defendant of portion of this property for a term of 10 years, that is, from 1306 to 1315 Fasli (inclusive). The lease contained a provision to the effect that if at any time during the currency of the lease the lessor should demand any portion of the rent in advance from the lessee, the latter would be bound to pay it on obtaining a receipt. The lease was registered. On the 25th of December 1902 a sum of Rs. 1,520 was paid in advance for rent by the lessee to the lessor on demand made by the lessor in pursuance of the above mentioned provision in the lease. This payment, it is found, satisfied the rent payable up to the end of 1314 Fasli. On the 20th of October 1903 the plaintiff purchased the property so leased at a sale in execution of a decree obtained against Sajjad Husain. He instituted the suit out of which this appeal has arisen for recovery of the rent for the year 1311 and part of 1312 Fasli, which had been already paid. He was met by the defence that the rent for that period had already been paid to Sajjad Husain under the provision in the lease. The

* Second Appeal No. 881 of 1905 from a decree of D. R. Lyle, District Judge of Moradabad, dated the 29th of June 1905 reversing a decree of Ajudhia Prasad, Assistant Collector, 1st Class, Sambhal, dated the 11th of May 1905.

Court of first instance (Assistant Collector) decreed the plaintiff's claim practically in full. On appeal by the defendants, however, this decree was reversed and the suit dismissed. The plaintiff appealed to the High Court.

Sir *Walter Colvin*, Mr. *W. K. Porter* and Lala *Girdhari Lal Agarwala*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The question for determination in this litigation is a novel one. One Sajjad Husain was the owner of certain property at or prior to the year 1898. On the 21st of September of that year he granted a lease to the defendant of portion of this property for a term of 10 years, that is, from 1306 to 1315 Fasli (inclusive). The lease contains a very unusual provision to the effect that if at any time during the currency of the lease, the lessor should demand any portion of the rent in advance from the lessee, the latter would be bound to pay it on obtaining a receipt. The lease was registered and is not disputed here. On the 25th of December 1902 a sum of Rs. 1,520 was paid in advance for rent by the lessee to the lessor on demand made by the lessor in pursuance of the provision in the lease to which we have referred. This payment, it is found, satisfied the rent payable up to the end of 1314 Fasli. On the 20th of October 1903 the plaintiff appellant purchased the property so leased at a sale in execution of a decree obtained against Sajjad Husain. He instituted the suit out of which this appeal has arisen for recovery of the rent for the year 1311 and part of 1312 Fasli, which had been already paid. He was met by the defence that the rent for that period had already been paid to Sajjad Husain under the provision in the lease.

The question is whether under such circumstances this is a good defence to the suit. As we have said, the lease is a registered document and the plaintiff appellant must be deemed to have purchased with knowledge of it. It was open to him when he was contemplating the purchase to make inquiry of the lessor or lessee as to whether or not any rent had been paid in advance according to the provision in the lease. He appears to have neglected to do so and purchased the property, no doubt, in the belief that he would be entitled to the rent from the date of purchase for the

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remainder of the term. But for the fact that the lease was a registered document, and that the rent had been paid *bonâ fide* in advance, in accordance with the condition in it, the plaintiff would probably have been in a position to establish his claim; but in view of the fact that the lease was registered and that payment of the rent claimed has been made in accordance with it *bonâ fide* before the date of the plaintiff's purchase, we are unable to dissent from the decision of the learned District Judge. The payment of rent before it becomes due is not ordinarily a fulfilment of the obligation imposed by a covenant to pay rent, but is in fact an advance to the lessor with an agreement on his part that when the rent becomes due such advance will be treated as a fulfilment of the obligation to pay the rent—see *De Nicholls* v. *Saunders* (1). We must hold, in view of the facts in this case, that the rent sought to be recovered in this suit was satisfied pursuant to the provisions of the lease by the advance previously made. The plaintiff appellant cannot complain, inasmuch as he did not take the precaution of making inquiry as to whether or not any money had been paid in advance as provided for by the document. We therefore dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.
1907
October 29,
December 5.

SURAJMANI AND OTHERS (DEFENDANTS) *v.* RABI NATH OJHA AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Gift—Construction of deed of gift—"Malik"—Gift to widow as "malik wa khud ikhtiyar"—"Absolute ownership"—Heritable and alienable estate—No distinction between male and female donee.

A Hindu executed a deed of gift of immovable property, to take effect after his death, to each of his two wives and his daughter-in-law, "as owners (maliks) with proprietary powers." One of his widows on coming into possession of her share made a will disposing of it in favour of her brother. In a suit by the next heirs of the donor questioning her power of alienation

Held that in the true construction of the deed the widow took a heritable and transferable estate in the property. The use of the word "malik" implies "absolute ownership" unless there is anything in the context or

Present :—Lord ROBERTSON, Lord COLLINS, and Sir ARTHUR WILSON.

(1) (1870) L. R., 5 C. P., 589.

surrounding circumstances to qualify such meaning: and it was not so qualified by the fact that the donee was a widow. In this case the context rather strengthened the presumption that the word was intended to bear its proper technical meaning.

Lalit Mohun Singh Roy v. *Chukkun Lal Roy* (1) and *Kollany Kooer* v. *Luchmee Pershad* (2) followed.

APPEAL from a judgment and decree (2nd November 1903) of the High Court at Allahabad which affirmed a judgment and decree (11th March 1901) of the Court of the Subordinate Judge of Gorakhpur.

The main question raised on this appeal was whether the first appellant Surajmani had or had not the power of alienation in regard to the property in suit. The following pedigree explains the suit and the relationship of the parties thereto.

ISHWAR NATH OJHA.

First wife, Musammat Dhan Mati. | Second wife, Musammat Surajmani, first defendant.

Deo Nath Ojha = Musammat Saraswati, died before suit.

Pirthumani.

Rabi Nath Ojha, plaintiff. | Ganga Dhar Ojha, plaintiff.

The property in suit belonged to Ishwar Nath Ojha, who died about 1882 leaving him surviving all the other persons named in the pedigree except his son, Deo Nath Ojha. On 2nd April 1877 he executed a will, of which the material portion is set out in their Lordships' judgment, leaving portions of the property to Dhan Mati, Surajmani, and Saraswati respectively. On Ishwar Nath Ojha's death Surajmani took possession of the property devised to her, and on 19th March 1896 she made a will by which she purported to dispose of it in favour of her brother Ram Narain Ojha, who died prior to the institution of the present suit, which was brought on 4th September 1900 by Rabi Nath Ojha and Ganga Dhar Ojha for a declaration that Surajmani was incompetent to execute the will of 19th March 1896 or to alienate the property.

The defendants were Surajmani and the heirs of Ram Narain Ojha, who denied the right of the plaintiffs to sue as they were not the next heirs of Ishwar Nath Ojha and Surajmani, and

(1) (1897) L. R. 24 I. A., 76: I. L. R., 24 Calc., 834.

(2) (1875) 24 W. R., 395.

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pleaded that the will of Ishwar Nath Ojha conferred on Surajmani a heritable and alienable estate which she was competent to transfer by her will.

The Subordinate Judge held that the will of Ishwar Nath Ojha only gave Surajmani the limited estate for life of a Hindu widow, and did not empower her to alienate the property. He therefore decreed the suit and made the declaration prayed for.

On appeal the High Court (KNOX and AIKMAN, JJ.) affirmed the decree of the Subordinate Judge.

The case before the High Court is reported in I. L. R., 25 All., 351.

On this appeal—

DeGruyther for the appellants contended that on the proper construction of the will of Ishwar Nath Ojha the appellant Surajmani acquired a heritable and transferable interest in the property devised to her. The word "malik" of itself implied absolute ownership, and therefore carried the power of alienation with it, unless there was anything in the will or deed of gift to qualify such meaning. Reference was made to *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1); *Rajnarain Bhadury* v. *Aushutosh Chuckerbutty* (2) and the same case on appeal *Rajnarain Bhadury* v. *Katyani Dabee* (3); *Padam Lal* v. *Tek Singh* (4); Mayne's Hindu Law, 6th ed., page 865, section 665; 7th ed., page 890, and *Jiwan Panda* v. *Sona* (5). Here there were no words to qualify the nature of the gift.

Ross for the respondents contended that the word "malik" meant "owner," and not necessarily "absolute owner"; the real meaning of the phrase in the will was "owner with independent authority." Reference was made to *Mathura Das* v. *Bhikhan Lal* (6); *Janki* v. *Bhairon* (7); Stoke's Hindu Law Books, Dayabhaga, page 241, chapter I, sections 1, 18, 19 and 23; Id. Mitakshara, Part II, page 373, chapter I, section 1, placitum 20. Mayne's Hindu Law, 7th ed., page 527, section 397; *Harilal Pranlal* v. *Bai Rewa* (8), and *Mahomed Shamsool Hooda* v. *Shewakram* (9). There must in the case of a widow be express words

(1) (1897) L. R., 24 I. A. 76; I. L. R., 24 Calc. 834.
(2) (1899) I. L. R., 27 Calc., 44.
(3) (1900) I. L. R., 27 Calc., 649.
(4) (1906) I. L. R., 29 All., 217.
(5) (1869) 1 N.-W. P., 6.
(6) (1896) I. L. R., 19 All., 16.
(7) (1896) I. L. R., 19 All., 133 (135).
(8) (1895) I. L. R., 21 Bom., 376.
(9) (1874) L. R., 2 I. A., 7 (15); 14 B. L. R., 226 (231,232).

in the will or deed of gift which give powers beyond what are given by the word "malik." In the case of *Rajnarain Bhadury* v. *Aushutosh Chuckerbutty* (1) and the same case on appeal (2) both the original and appellate courts held that there was something more than the mere gift of ownership, and that the additional words gave an absolute estate with power of alienation, and on that ground they distinguished the case from the Bombay case above cited. The Courts below were right, it was therefore submitted, in holding that the appellant Surajmani took only a limited estate in the property.

DeGruyther replied referring to *Mahomed Shamsool Hooda* v. *Shewakram* (3); and *Kollany Kooer* v. *Luchmee Pershad* (4).

1907, *December* 5th:—The judgment of their Lordships was delivered by LORD COLLINS:—

This is an appeal from the High Court at Allahabad affirming the decision of the Subordinate Judge of Gorakhpur. The question is whether the first appellant, Musammat Surajmani, acquired a right to alienate the property now in suit under a deed of gift or testamentary instrument of her late husband, Ishwar Nath Ojha. The material part of the document is as follows:—

"I now of my own free will and accord while in a sound state of mind and in enjoyment of my senses make a gift of the entire village Dwarkapur Nankar in tappa Asnari and half of the village Telpurwa in tappa Pachhar to Musammat Dhanmati, my first wife, the entire village Doharia Khurd in tappa Banjarha and half of mauza Telpurwa aforesaid to Musammat Surajmani, my second wife, and half of mauza Jamla Jot, *i.e.*, an eight anna share in it, in tappa Barikpur to Musammat Sarsuti, my daughter-in-law, out of the aforesaid property without consideration on the conditions that during my lifetime shall remain in possession of the said property as heretofore, and my name shall remain recorded in respect of it in the public records and the Musammats aforesaid shall be maintained by me, that after my death they shall under this document get their names recorded in the public records in respect of their respective properties given to them and remain in possession as owners with proprietary powers; and that if perchance I have a male issue hereafter, this deed of gift shall be considered null and void as against him."

The words translated "as owners with proprietary powers" are in the original "malik wa khud ikhtiyar." The appellants

(1) (1899) I. L. R., 27 Calc., 44.
(2) (1900) I. L. R., 27 Calc., 649.
(3) (1874) L. R., 2 I. A., 7 (14); 14 B. L. R., 226 (231).
(4) (1875) 24 W. R., 395.

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contend that these words are amply sufficient to confer an alienable estate. The respondents, on the other hand, contended, and the Courts below have held, that under these words the lady took no more than the ordinary estate of a Hindu widow, which is inalienable except in special conditions which are not alleged to exist in this case.

After the death of her husband Musammat Surajmani entered into possession of the property given to her and has purported to dispose of it by will in favour of her brother Ram Narain Ojha. The present suit is brought by the plaintiffs (respondents) as heirs of Ishwar Nath and of Surajmani for a declaration that the latter was incompetent to execute the said will, and it is against the decision in their favour that this appeal is brought. The effect of the word "malik" in testamentary gifts has been often discussed in cases decided in the different Courts in India, where there has been apparently some fluctuation of opinion. For instance, since this case was decided in the High Court of Allahabad, the same Court, differently constituted, has refused to follow it and expressed the opinion that the words in question passed the absolute estate, *Padam Lal* v. *Tek Singh* (1).

In the present case the Subordinate Judge seemed to recognize that the trend of the decisions of the Calcutta Courts was opposed to his view, but felt bound to follow what he thought was the result of the Allahabad cases, which were binding upon him.

In *Kollany Kooer* v. *Luchmee Pershad* (2) decided in 1875, Mitter J., in dealing with the case of a will where the donees were the widow and daughter of the testator, and the word "malik" was used, thus expresses himself (at p. 396) :—

"As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and daughter. He says tha after his death they shall be (maliks) proprietors and his entire estate shall devolve upon them. In *Jotendro Mohun Tagore* v. *Ganendro Mohun Tagore* (3) the Judicial Committee say :—'If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo Law (as under the present state of the law it does by will in England) an estate of inheritance.' In the testamentary instrument under our consideration, from the context it does not appear that the testator intended a limited gift in favour of Bani

(1) (1906) I. L. R., 29 All., 217, at pp. 221, 222. (2) (1875) 24 W. R., 395.
(3) (1872) L. R. I. A., Sup. Vol., 47 (66) : 9 B. L. R., 377 (396) : 18 W. R., 359, at p. 365.

Kooer and Uma Kooer. Therefore adopting the rule of construction above quoted we must hold that the gift in question was an absolute gift unless it can be shewn that by the Hindoo law gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to the 'widow's estate' under the law of inheritance. I am not aware of any such provision in the Hindoo law nor have we been referred to any authority in support of it."

The question as to the effect of the word "malik" came before this Board in 1897 in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1). The donee in that case was a man, but the principles of interpretation laid down were of general application. Referring to the donee the testator said:—

"If no children are born to me . . . or if at the time of my death they are not alive, then . . . my nephew . . . becoming on my death my sthalabhishikta and becoming owner (malik) of all my estate and properties, &c., shall, remaining my sthalabhishikta, obtaining the management of the Iswarshebas . . . enjoy with son, grandson, and so on in succession the proceeds of my estate . . . The minor, on reaching majority, shall exercise ownership (malikatwa) over all the properties."

In delivering the judgment Lord Davey, at p. 88 of L. R., 24 I. A., says:

"It was not disputed . . . that the son of the testator, if there had been one, or his daughter, if there had been one, would have taken an absolute heritable and alienable estate . . . Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words 'become owner (malik) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson, and so on in succession' which latter words are frequently used in Hindoo wills and have acquired the force of technical words conveying an heritable and alienable estate."

This case seems to adopt and apply the same view of the word "malik" as was taken in the Calcutta case of *Kollany Kooer* v. *Luchmee Pershad* (2) above cited, with the result that in order to cut down the full proprietary rights that the word imports something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents, but the fact that the donee is a woman and a widow, which was expressly decided in the last mentioned case not to suffice. But while there is nothing in the context or surrounding facts to displace the

(1) (1897) L. R., 24 I. A., 76 : I. L. R., 24 Calc., 834.

(2) (1875) 24 W. R., 395.

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presumption of absolute ownership implied in the word "malik," the context does seem to strengthen the presumption that the intention was that "malik" should bear its proper technical meaning. It is to be observed that the gift to the testator's daughter-in-law, Musammat Saraswati, is made in precisely the same terms. The learned counsel for the respondents was unable to adduce any reason for holding that in her case the gift should be cut down to anything less than a full proprietary right, and, if this be admitted, the respondents have to contend for two contradictory interpretations of the same phrase.

In the result, therefore, with the greatest respect for the learned Judges in the Courts below, their Lordships are unable to agree with their decision. Their Lordships will humbly advise His Majesty that the appeal be allowed and the decrees of both Courts below discharged, and instead thereof the suit dismissed with costs in both Courts. The respondents will pay to the appellants the costs of this appeal.

Appeal allowed.

Solicitors for the appellants—*Pyke, Parrott & Co.*

Solicitors for the respondents—*Osborn Jenkyn & Son.*

J. V. W.

1907
July 17.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ASHIQ HUSAIN AND OTHERS (DEFENDANTS) *v.* ASGHARI BEGAM AND ANOTHER (PLAINTIFFS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 32—*Exproprietary holding—Suit for possession of half of an exproprietary holding.*

The plaintiffs sued to recover possession of one half of an exproprietary holding, and added a prayer for "any other relief which might in the opinion of the Court be deemed just and proper." *Held* that the suit for possession of half of the exproprietary holding would not lie, being opposed to section 32 of the Agra Tenancy Act, 1901, but that, on the finding that the plaintiffs' share in the holding was one half, the plaintiffs were entitled to a decree declaring their right to a half share.

THIS was a suit brought by Musammat Asghari Begam and Musammat Akbari Begam, the daughters of one Masum Ali, for

* Second Appeal No. 195 of 1905 from a decree of Alopi Prasad, Additional Subordinate Judge of Moradabad, dated the 23rd of December 1904, modifying a decree of Mohan Lal Hukku, Munsif of Havali, Moradabad, dated the 29th of June 1904.

possession of a half share of an exproprietary holding, 17 bighas 7 biswas in extent, and for dispossession of the defendants from that share, the allegation being that the defendants had taken possession of the whole of the holding. The plaintiffs also claimed mesne profits. The plaint contained a prayer to the effect that the plaintiffs might be granted any other relief which might, in the opinion of the court, be deemed just and proper. The court of first instance (Munsif of Havali, Moradabad) gave the plaintiffs a decree for joint possession of 15 million odd sihams out of 76 million odd sihams. From this decree the plaintiffs appealed. The lower appellate court (Subordinate Judge of Moradabad) decreed their claim for possession of a half share out of the whole and also for mesne profits. The defendants thereupon appealed to the High Court.

Munshi *Gulzari Lal*, for the appellants.

Munshi *Gokul Prasad* (for whom Mr. *M. L. Agarwala*), for the respondents.

BANERJI and AIKMAN, JJ.—The suit which has given rise to this appeal was brought by Musammat Asghari Begam and Musammat Akbari Begam, the daughters of one Masum Ali, for possession of a half share of an exproprietary holding, 17 bighas 7 biswas in extent, and for dispossession of the defendants from that share, the allegation being that the defendants had taken possession of the whole of the holding. The plaintiffs also claimed mesne profits. The plaint contained a prayer to the effect that the plaintiffs might be granted any other relief which might, in the opinion of the Court, be deemed just and proper. The Court of first instance gave the plaintiffs a decree for joint possession of 15 million odd sihams out of 76 million odd sihams. From this decree the plaintiffs appealed. The lower appellate Court decreed their claim for possession of a half share out of the whole and also for mesne profits. The defendants have preferred this second appeal. One of the appellants Musammat Said-un-nissa died after the institution of the appeal, and although six months have expired from the date of her death, no legal representative has been brought on the record in her place. On this ground it was contended on behalf of the respondents that the appeal had abated. We are unable to accept this contention. Said-un-nissa was sued

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ASHIQ HUSAIN v. ASGHARI BEGAM.

as a *pro formâ* defendant, and the lower appellate Court found that she had ceased to have any interest in the property. It is clear that the other defendants could have maintained the appeal even if she had not joined them. Under these circumstances we cannot hold that the appeal of the other defendants has abated. It of course abates so far as it is an appeal by Said-un-nissa.

The first plea in the memorandum of appeal is based upon the provisions of section 32 of the Tenancy Act which says that no suit for the division of a holding shall be entertained in a Civil or Revenue Court. The decree of the lower appellate Court awarding to the plaintiffs possession of a half share and directing the dispossession of the defendants from the share is substantially a decree for the division of the holding. This, according to the language used in sub-section (2) of section 32, is a decree which no Court, Civil or Revenue, can pass. It may be that the intention of the Legislature was to forbid the institution of a suit for the division of a holding as against the landholder only, but the language used in the said sub-section is general and does not give effect to any such intention. The plaintiffs, however, in their plaint ask for such other relief as the Court might deem fit to grant; and, therefore, if they are entitled to any other relief, it would be only just that such relief should be decreed to them. The Court below has found that the extent of the plaintiffs' share in the holding in question is half. That finding is based upon evidence, and is conclusive in this second appeal. Upon that finding the plaintiffs are entitled to a declaration that they have a right to a half share in the holding jointly with the defendants Nos. 1 to 4 and this declaration, we think, is what ought to have been granted in the present suit.

The second plea taken in the memorandum of appeal is based upon a misconception.

The third and fourth pleas are concluded by the findings of the Court below.

The fifth plea has in our opinion no force. Upon the finding of the Court below the plaintiffs are entitled to the mesne profits awarded to them. We therefore vary the decree of the Court below to this extent that, in lieu of the decree for possession of a

half share in 17 bighas 7 biswas and dispossession of the defendants from that share, we make a decree declaring the plaintiffs entitled to a half share in the said land jointly with the first four defendants. In other respects we affirm the decree of the Court below. We direct the parties to bear their own costs in this Court.

Decree modified.

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ASHIQ HUSAIN *v.* ASGHARI BEGAM.

APPELLATE CRIMINAL.

1907 *November* 14.

Before Mr. Justice Banerji and Mr. Justice Aikman.

EMPEROR *v.* QADIR BAKHSH AND OTHERS. *

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 28, 231—*Counterfeiting coin—Definition—Intention.*

In order to constitute the offence defined by section 231 of the Indian Penal Code, it is not necessary that the counterfeit coin should be made with the primary intention of its being passed as genuine: it is sufficient if the resemblance to genuine coin is so close that it is capable of being passed as such.

IN April 1907 certain Nepalese came to the shop of one Qadir Bakhsh in Benares, and at their request Qadir Bakhsh agreed to make for them in German silver a number of imitations of a current Nepalese coin, a sample of which was given to him. The coins were seemingly not intended originally to be passed as genuine coins, for it was stipulated that they should be made with hooks attached to them; but in fact this was not done, and the coins were handed over plain. The coins when made were a very passable imitation of the original, and, as the High Court found, might well be used for purposes of deception. On these facts Qadir Bakhsh and two of his workmen were committed for trial under section 231 of the Indian Penal Code, but were acquitted upon the ground that the coins were made for use as ornaments only and there was no intention to pass them off as genuine coins. Against this order of acquittal the present appeal was preferred by the Local Government.

The Government Advocate (Mr. *A. E. Ryves*) for the Crown:

Mr. *G. W. Dillon*, for Qadir Bakhsh.

BANERJI and AIKMAN, JJ.—This is an appeal by the Local Government from an original order of acquittal passed by the

* Criminal Appeal No. 656 of 1907, against an order of Baij Nath, Sessions Judge of Benares, dated the 3rd of July 1907.

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officiating Sessions Judge of Benares. The three accused were committed to his Court charged with the offence of counterfeiting coin, punishable under section 231, Indian Penal Code. It is proved and admitted that under the direction of Qadir Bakhsh the first accused, the other two accused, who are workmen in his employment, manufactured, out of German silver, coins which we have satisfied ourselves by inspection closely resemble genuine coins current in the Nepal State. The learned Officiating Sessions Judge was of opinion that as it was not the intention of the accused that deception should be practised, nor had they knowledge that deception was likely to be practised, no offence was committed. He refers to the explanation appended to section 231, Indian Penal Code, which, we may remark, has no application to the case. He overlooked the provisions of section 28 of the Code in which the word counterfeit is defined and in particular the second Explanation appended to that section. That Explanation is as follows:—"When a person causes one thing to resemble another, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised." As we have said above, the coins manufactured by the accused are very good imitations of a genuine coin, and we have no hesitation in holding that persons might be deceived by the resemblance. That being so, the presumption referred to in the Explanation arises, and it is for the accused to prove that their intention was innocent or that they did not know that it was likely that deception would be practised. The learned counsel who has appeared on behalf of the accused contends that the accused have discharged the onus which lies on them. In support of his contention he has referred to the low charge made by the accused for manufacturing the coins; to the fact that the accused manufactured a larger number of coins which are not current than of coins which are current in Nepal; to the frank admission made by the accused, and to the absence of concealment. These are undoubtedly circumstances to be taken into consideration, but we are of opinion that they are insufficient to

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discharge the burden which the law imposes on the accused. As the learned Government Advocate has urged in his argument, it is a dangerous thing to manufacture imitations of current coins, and this is no doubt the reason for the stringency of the law as contained in Explanation 2 of section 28 of the Indian Penal Code. We are therefore of opinion that the appeal must be allowed. The learned Government Advocate, however, does not press for a heavy sentence and explains that the object of the appeal is to obtain a pronouncement by this Court as to whether the law laid down by the Court below was correct. Having regard to this and to the circumstances of the case we impose a light sentence. We allow the appeal, set aside the order of acquittal, and convicting Qadir Bakhsh, Algu and Karim Bakhsh under section 231, Indian Penal Code, direct that the District Magistrate do send for the three accused and detain them in his Court until the rising of the Court. We further order that, the accused Qadir Bakhsh do pay a fine of Rs. 10 or in default undergo one month's rigorous imprisonment.

APPELLATE CIVIL.

1907 *November* 20

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

AMBIKA PARTAP SINGH (DEFENDANT) *v.* DWARKA PRASAD AND OTHERS (PLAINTIFFS) AND DALEL KUNWAR AND OTHERS (DEFENDANTS).*

Hindu law—Hindu widow—Mortgage of husband's estate adversely to adoptive son—Suit to enforce mortgage against adoptive son—Act No. IV of 1882 (*Transfer of Property Act*), *section* 52—*Lis pendens—Contentious suit—Application for leave to sue in formâ pauperis—Civil Procedure Code, section* 410.

A mortgage of part of her late husband's estate was executed by a Hindu widow in defiance of the rights of her husband's adopted son, and in fact in collusion with the mortgagee and in order to deprive the adopted son of his adoptive father's estate. Shortly before this mortgage was executed by the widow the adopted son had applied for leave to sue *in formâ pauperis* for the recovery of his adoptive father's estate. *Held*, on suit by the mortgagees to enforce their mortgage against the adopted son, then in possession, that the suit must fail, both because the fact of the estate having to some slight extent benefited by the money borrowed was not sufficient under the

* First Appeal No. 160 of 1905 from a decree of Aziz-ur-Rahman, Subordinate Judge of Mainpuri, dated the 23rd of March 1905.

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circumstances to make the mortgage enforceable against the adopted son—*Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1) distinguished—and also because of the application of the doctrine of *lis pendens*. *Faiyaz Husain Khan* v. *Prag Narain* (2) referred to.

THIS was a suit brought by Dwarka Prasad and others as mortgagees to enforce payment of the amount alleged to be due on a mortgage of the 17th of January 1894. By this mortgage Musammat Dalel Kunwar, the widow of one Chaudhri Gandharp Singh, alleging herself to be the owner in possession, hypothecated a ten biswas share in four villages to secure a principal sum of Rs. 7,000 in favour of one Shukul Ganga Prasad, deceased, the father of the four plaintiffs. The mortgaged property formed part of the estate of Chaudhri Gandharp Singh, who died on the 23rd of December 1891, leaving the defendant Ambika Partap Singh, his adopted son and heir, and also his widow Musammat Dalel Kunwar him surviving. A claim to this estate was set up on behalf of Bindraban *alias* Ambika Partap Singh, the grandson of the mortgagee and son of the plaintiff Shukul Dwarka Prasad. He was put forward as being the adopted son of Gandharp Singh, and was strongly supported in this claim by Dalel Kunwar. Thereupon the defendant Ambika Partap Singh instituted a suit *in formâ pauperis* in the Court of the Subordinate Judge of Mainpuri for recovery of possession of the estate of Gandharp Singh, and his claim was decreed on the 21st of March 1896. An appeal to the High Court was preferred, but the decree of the Court below was upheld on the 12th of May 1899 and on the 12th of August following he obtained possession of the estate. It was during the pendency of this suit that Musammat Dalel Kunwar, who supported the false claim of the grandson of Ganga Prasad, the mortgagee, mortgaged the property in favour of Ganga Prasad as the head of the family of the plaintiffs. In the mortgage deed the money is stated to have been borrowed to pay up a decree obtained by parties of the name of Chunni Lal and Munni Lal against Gandharp Singh, and other debts due by Gandharp Singh, and Dalel Kunwar, the mortgagor, and also alleged irrigation charges.

The Court of first instance (Subordinate Judge of Mainpuri) found that Dalel Kunwar acted in collusion with, and was helped

(1) (1856) 6 Moo., I. A., 393. (2) (1907) I. L. R., 29 All., 339.

by, the plaintiff Dwarka Prasad and that she tried her utmost to deprive the defendant Ambika Partap Singh of Gandharp Singh's estate; that Dwarka Prasad was trying his very best to secure the whole estate for his own son, setting him up as the real Ambika Partap and also setting up a verbal will by Gandharp Singh in his favour. In his judgment he says:— "The widow and Dwarka Prasad knew very well that the defendant (Ambika Partap) had a strong case. They had no hope of success. They therefore tried their best to get hold of some portion of the property, and in order to do so they got up the bond in suit." He then states that "they knew very well that the question of legal necessity would arise" and had one item, namely, the decree of Chunni Lal to support a case of legal necessity. As regards the other items he found that they were fictitious and false. But he found that Dalel Kunwar was competent to mortgage the property for the benefit of the minor owner for the sake of saving any portion of it, and that the mortgage to the extent of the amount of the decree of Chunni Lal and Munni Lal was binding upon the defendant Ambika Partap.

The defendant Ambika Partap Singh appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, Dr. *Satish Chandra Banerji* and Babu *Surendra Nath Sen*, for the appellant.

The Hon'ble Pandit *Sundar Lal* and Munshi *Govind Prasad*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal is connected with F. A. No. 154 of 1905, and arises out of a suit brought by the plaintiff to enforce payment of the amount alleged to be due on a mortgage of the 17th of January 1894. By this mortgage Musammat Dalel Kunwar, the widow of one Chaudhri Gandharp Singh, alleging herself to be the owner in possession, hypothecated a ten biswas share in four villages to secure a principal sum of Rs. 7,000 in favour of one Shukul Ganga Prasad deceased, the father of the four plaintiffs. The amount claimed in the plaint is no less a sum than Rs. 38,917, the interest claimed being Rs. 32,556-1-1. The mortgaged property formed part of the estate of Chaudhri Gandharp Singh, who died on the 23rd of December 1891, leaving the defendant Ambika Partap Singh,

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his adopted son and heir, and also his widow Musammat Dalel Kunwar him surviving. A claim to this estate was set up on behalf of Bindraban *alias* Ambika Partap Singh, the grandson of the mortgagee, and son of the plaintiff Shukul Dwarka Prasad. He was put forward as being the adopted son of Gandharp Singh, and was strongly supported in this claim by Dalel Kunwar. Thereupon the defendant Ambika Partap Singh instituted a suit *in formâ pauperis* in the Court of the Subordinate Judge of Mainpuri for recovery of possession of the estate of Gandharp Singh, and his claim was decreed on the 21st of March 1896. An appeal to the High Court was preferred, but the decree of the Court below was upheld on the 12th of May 1899 and on the 12th of August following he obtained possession of the estate. It was during the pendency of this suit that Musammat Dalel Kunwar, who supported the false claim of the grandson of Ganga Prasad the mortgagee, mortgaged the property in favour of Ganga Prasad, as the head of the family of the plaintiffs. In the mortgage-deed the money is stated to have been borrowed to pay up a decree obtained by parties of the name of Chunni Lal and Munni Lal against Gandharp Singh, and other debts due by Gandharp Singh and Dalel Kunwar, the mortgagor, and also alleged irrigation charges.

The learned Subordinate Judge found that Dalel Kunwar acted in collusion with, and was helped by, the plaintiff Dwarka Prasad and that she tried her utmost to deprive the defendant Ambika Partap Singh of Gandharp Singh's estate; that Dwarka Prasad was trying his very best to secure the whole estate for his own son, setting him up as the real Ambika Partap and also setting up a verbal will by Gandharp Singh in his favour. In his judgment he says :— "The widow and Dwarka Prasad knew very well that the defendant (Ambika Partap) had a strong case. They had no hope of success. They therefore tried their best to get hold of some portion of the property, and in order to do so they got up the bond in suit." He then states that "they knew very well that the question of legal necessity would arise" and had one item, namely, the decree of Chunni Lal to support a case of legal necessity. As regards the other items he found that they were fictitious and false. But he found that Dalel

Kunwar was competent to mortgage the property for the benefit of the minor owner for the sake of saving any portion of it, and that the mortgage to the extent of the amount of the decree of Chunni Lal and Munni Lal was binding upon the defendant Ambika Partap.

This ruling is now challenged on the ground that under no rule of law or equity is Ambika Partap bound to pay any portion of a mortgage executed by a party who could in no way be said to have acted for him, but, on the contrary, resisted his claim in collusion with, and helped by, the plaintiff Dwarka Prasad. This Dwarka Prasad was the chief actor in the transaction, as he himself admits. In his evidence he deposed that the mortgage was executed under his supervision and that he was instrumental in obtaining it.

That Dalei Kunwar resisted the claim of the plaintiff and espoused the cause of the false claimant Bindraban is admitted; that she in no way in the transaction acted or purported to act on behalf of the defendant Ambika Partap Singh, also is not and could not be denied. She repudiated his claim throughout. The question then is whether, despite the adverse attitude of the mortgagor against her husband's adopted son, a mortgage executed by her in collusion with the mortgagee, not as guardian of such son, but in her own right, can be enforced against the son to the extent of a debt which was not a charge on the estate, merely on the ground that the estate was benefited by the payment of such debt. In support of an affirmative answer to this question the well-known case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1), in which the powers of a manager for an infant heir to create charges on an estate according to Hindu law are defined, is relied on. In that case the widow of Raja Sheo Buksh Singh, who had died, leaving an only son, an infant, assumed on his death the proprietorship of his estates and the guardianship of the son, and to satisfy debts charged on the estate executed a mortgage describing herself therein as being possessed of the mortgaged property in proprietary right. The son, after he came of age, instituted a suit for the recovery of possession of the mortgaged

(1) (1856) 6 Moo., I. A., 393.

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estate, and to have the mortgage created by his mother set aside. It was held by their Lordships of the Privy Council, reversing the decision of the Sadar Dewani Court at Agra, that the Rani ought to be deemed to have executed the mortgage bond in question as and in the character of guardian of her infant son, and that so far as the estates benefited by the mortgage, it was binding on the owner. Their Lordships also stated that, assuming the bond to have been invalid and ineffectual, the mortgagee would nevertheless be entitled to the benefit of any prior mortgage or mortgages paid off by him affecting the property comprised in the bond, if and in so far as such prior mortgage or mortgages was or were valid and effectual. Now in that case it is to be observed that the suit was a suit by the owner to have a mortgage bond set aside and for possession of the estates comprised therein, and not, as in the present case, a suit by the mortgagee to enforce payment of an alleged mortgage debt by sale of the mortgaged property. The suit was not a suit in which an invalid mortgage was sought to be enforced, but a suit in which possession of mortgaged property was sought to be recovered as against a mortgagee. The plaintiff in that case seeking the assistance of a Court of Equity was bound to do equity. The widow in executing the mortgage did not, as in the case before us, set up any adverse title against her son. On the contrary she recognized his rights. In the course of their judgment their Lordships say :—" It is not suggested that she ever claimed any beneficial interest in the estate as proprietor; had she done so, it would have been *pro tanto* a claim adverse to her son ; and it is conceded by the respondents' counsel that she did not claim adversely to her son," and later on, "they consider that the acts of the Rani cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself or others gave to her; that she must be viewed as a manager inaccurately and erroneously described as 'proprietor' or 'heir,' etc." The facts in the case before us are essentially different. In it the holder of an invalid mortgage is not the defendant, but is the plaintiff seeking to recover by sale of the property included in the invalid instrument the amount expressed to be secured by it. Dalel Kunwar did not purport to act as manager or agent for the

appellant Ambika Partap Singh; on the contrary she had espoused the cause of the mortgagee's grandson, who falsely claimed to be adopted son of Gandharp Singh. She executed the mortgage whilst the suit of Ambika Partap Singh for the recovery of the estates was pending, and that too nominally in favour of the grandfather of the claimant, who was supporting the claim of his grandson against the true owner. That the mortgagee knew all the circumstances cannot be doubted. His son, who acted for him and procured the execution of the mortgage, certainly did, and it cannot be said that any of the parties to the transaction acted *bonâ fide* or honestly. We are at a loss to see under such circumstances on what equitable principle the mortgage so executed can be properly enforced. Whether the plaintiff can recover any part of the sum expressed to be secured by the mortgage in an action for debt, or in any other form, is a question we cannot discuss. Suffice it to say that in our judgment they have no right to ask a Court of Equity to enforce by a decree for sale the invalid mortgage, the subject of this litigation, a mortgage which was executed by Dalel Kunwar with the sinister object of depriving the true owner of his property—a mortgage which owed its existence to a dishonest desire on the part of both the mortgagor and the mortgagee to wrest the estates from Ambika Partap. We do not, therefore, think, for the reasons which we have stated, that the ruling in the case of *Hunoomanpersaud Panday* is applicable. The essential difference between this case and that is that in the latter the attacking party was the owner who had benefited by the invalid mortgage and sought to recover possession from the mortgagees without restoring the benefit which he derived from them, while in this case the mortgagee is the attacking party who is seeking to recover money alleged to be due on an invalid mortgage by sale of the property which it purported to mortgage.

But there is another answer to the plaintiff's claim. The mortgage in suit was executed by Dalel Kunwar on the 17th of January 1894; but prior to that date, namely, on the 27th of June 1893, Ambika Partap Singh had made an application to the Court for permission to sue *in formâ pauperis* for recovery of the estate of Gandharp Singh, part of which was the subject of the mortgage,

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Dalel Kunwar and Bindraban being the defendants. Dalel Kunwar resisted this application, and in resisting it acted as guardian for Bindraban. The application was granted on the 12th of May 1894, and the suit was, as we have already said, successfully prosecuted by Ambika Partap Singh as well in the Court of first instance as in the High Court. There was, therefore, at the date of the execution of the mortgage a contentious suit or proceeding pending, in which the right of Ambika Partap Singh to the property which was comprised in the mortgage was directly in question. Section 52 of the Transfer of Property Act prescribes that during the active prosecution of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court. No authority was given to Dalel Kunwar to execute the mortgage. Mr. *Sundar Lal*, on behalf of the respondents, contended that the section of the Act in question has no application. His argument was that until the application of the defendant-appellant for leave to sue *in formâ pauperis* had been granted, that is, on the 12th of May 1894, there was no suit pending within the meaning of that section, and he relied upon section 410 of the Code of Civil Procedure, which declares that when an application to sue *in formâ pauperis* is granted and has been numbered and registered, it shall then be deemed the plaint in the suit, and he argued that there was no suit pending at the date of the execution of the mortgage inasmuch as the application for leave to sue had not at that time been numbered and registered. We cannot agree with him in this contention. It appears to us that so soon as the defendant filed his application for leave to sue, there was a contentious suit, or at least a contentious proceeding, pending within the meaning of the section, and it is clear that that suit or proceeding was at the time being actively prosecuted. In this connection we may cite the ruling of their Lordships of the Privy Council in the case of *Faiyaz Husain Khan* v. *Prag Narain* (1) to the effect

(1) (1907) I. L. R., 29 All., 339.

that where a suit is contentious in its origin and nature, it is not necessary that the summons should have been served in the suit in order to make it "contentious" within the meaning of section 52. Mr. *Chaudhri* relied upon the explanation to section 4 of the Indian Limitation Act as supporting his proposition that the suit is instituted in the case of a pauper when the application for leave to sue as a pauper is filed. This section, no doubt, gives support to his argument, but we think that there is no need to fall back upon it in view of the clear and specific language of section 52 of the Transfer of Property Act.

For the foregoing reasons we are of opinion that the Court below should have dismissed the plaintiff's claim *in toto*. We accordingly allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

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November 20.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

INDAR SEN SINGH (DEFENDANT) *v.* RIKHAI SINGH AND OTHERS (PLAINTIFFS) AND KAMAR-UN-NISSA BIBI AND OTHERS (DEFENDANTS).*

Procedure—Relief granted which was not asked for by the plaintiffs—Appeal—Court fee.

The plaintiffs in a suit for sale on a mortgage were granted by the first Court a relief for which they had not asked and which could not properly have been granted to them without an amendment of the plaint. On appeal by one of the defendants the appellant was made to pay an additional court fee corresponding to the relief granted to the plaintiffs. The plaintiffs respondents were also required to make good the deficiency in the court fee paid in the first Court. This the plaintiffs declined to do unless the decree was confirmed in its entirety. *Held* that the plaintiffs were not entitled to retain the full benefit of the first Court's decree nor liable to pay the additional court fee; and the appellant might on application to the proper authority obtain a refund of the excess court fee which he had been erroneously compelled to pay.

THE plaintiffs in this case sued to enforce a mortgage of the 10th of November 1897. The principal answering defendant Indar Sen Singh was a puisne mortgagee holding a mortgage of the 1st of November 1898, and he also claimed the right to set up as a shield against the claim of the plaintiffs an earlier mortgage of the 17th of September 1897. In the course of the

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* First Appeal No. 186 of 1905, from a decree of Syed Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 15th of April 1905.

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suit it was discovered that there existed two prior mortgages affecting the whole or a portion of the mortgaged property, namely, one of the 1st of March 1888 and another of the 23rd of February 1891. The Court of first instance (Subordinate Judge of Jaunpur) found as to the main issue that the defendant Indar Sen Singh was not entitled to set up as a shield the earlier mortgage put forward by him. That Court accordingly granted the plaintiffs a decree for sale of the property covered by the mortgage in suit in default of payment of the mortgage debt. As to the two mortgages of 1888 and 1891, the Court held, notwithstanding that the plaintiffs had claimed no relief in respect thereof, that they were entitled in the present suit to redeem them, and passed a decree to that effect. The defendant Indar Sen Singh appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, Mr. *J. Simeon* and Babu *Mangal Prasad Bhargava*, for the respondents.

The Court (STANLEY, C.J., and BURKITT, J.), after a discussion of the main point in the case arrived at the same conclusion in respect thereof as the Court below had done and accordingly dismissed the appeal. As to the inclusion in the decree below of the two mortgages of the 1st of March 1888 and the 23rd of February 1891, their Lordships' judgment was as follows:—

There is a matter to which our attention has been directed. The suit is a suit to enforce payment of a mortgage of the 10th of November 1897 by sale of the mortgaged property, and for no other relief. In the course of the proceedings, however, it was discovered that there were two prior mortgages affecting the whole or portion of the mortgaged property, namely, a mortgage of the 1st of March 1888, and another of the 23rd of February 1891. No relief was asked in respect of these mortgages, but in the decree of the Court below it was provided that the plaintiffs, on payment of prior mortgages, should be competent to get the property sold by auction, a relief which was not sought. No provision is made in the decree for the sale of the property to satisfy these debts, if paid. The stamp officer of the Court has reported that the court fee paid by the plaintiff in the Court below, in view of the relief given to him, was insufficient, and that the court fee

paid on the appeal has already been made good, but the deficiency, if any, on the plaint has not been paid. It appears to us that in view of the relief claimed by the plaintiffs in their plaint, the court fees, which have been paid both here and below, are sufficient. Mr. *Sundar Lal*, on behalf of the plaintiffs respondents, expressed his willingness to pay the additional court fee, provided the Court gave his clients the supplemental relief to which the clients would be entitled if the plaint were amended and proper reliefs arising out of the existence of these prior mortgages be granted, but he objects to the payment of any additional court fees unless he gets those additional reliefs. We think his contention is right, and that the decree of the Court below went too far in providing for the redemption of the earlier mortgages, a relief which, we have said before, was not sought. We think that the best course is to modify the decree of the Court below by striking out the portion which deals with the prior mortgages. The directions contained in the decree from the words "if the plaintiffs pay" down to the words "Muhammad Mohsin" should be struck out of the decree. The decree will then be the usual mortgage decree for the sale of the mortgagee's rights in the mortgaged property, without prejudice to the claim of any prior incumbrancers. We direct a decree to be so framed, and we extend the time for payment of the mortgage debt up to the 20th of May 1908. On an application in the proper quarter the appellants may be able to obtain a return of the additional court fees which they have been required to pay.

Decree modified.

1907
December 2.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BANARSI PRASAD (DEFENDANT) *v.* RAM NARAIN AND OTHERS (PLAINTIFFS).*

Guardian and minor—Guardian ad litem—*Civil Procedure Code, section 447—Necessity of formal discharge from the duties of guardian* ad litem—*Suit to set aside a decree.*

Held that no suit will lie to set aside a decree where fraud is neither alleged nor proved and no specific relief is asked for save and except the setting aside of the decree. *Umrao Singh* v. *Hardeo* (1) referred to.

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* First Appeal No. 18 of 1907, from a decree of Girraj Kishor Dat, Subordinate Judge of Bareilly, dated the 30th of November 1906.

(1) (1907) I. L. R., 29 All., 418.

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Held also that where the same person is both certificated guardian and guardian *ad litem* to minor plaintiffs, the fact that one of such plaintiffs has come of age and been appointed certificated guardian of the persons and property of the others would not relieve the original guardian of her duties as guardian *ad litem*: to do this requires a special order under section 447 of the Code of Civil Procedure.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviyā* and Babu *Sital Prasad Ghose*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit to set aside a decree passed by the Subordinate Judge of Bareilly on the 15th of May 1905 in a redemption suit. The former suit was instituted so far back as the 6th of April 1905, and was a suit for redemption of mortgage and for accounts. The plaintiff in that suit was Kunwar Hulas Singh, the father of the present plaintiffs respondents. The suit was decreed and redemption allowed. The matter came before the High Court on second appeal when this Court affirmed the decree for redemption and directed accounts to be taken on the basis of the gross rental and not upon the basis of actual profits. An appeal was preferred to His Majesty in Council and a decree was passed by the Privy Council on the 25th of March 1903. The case is reported in the Indian Law Reports, 25 All., 387. Upon the question as to the principle upon which the account should be taken their Lordships of the Privy Council reversed the decision of this Court, holding that the defendant mortgagee was not responsible for the amount of the gross rental as shown in the jamabandi but only for such sums as were actually received by him or on his behalf, and such further sums, if any, as might have been received by him but for his own neglect or fault. Their Lordships accordingly directed that an account should be taken of the defendant's receipts and payments under the mortgage deed and that the ultimate balance due to or from the defendant should be certified. We should mention that prior to the decision of the appeal in this Court the appellant Kunwar Hulas Singh died. His three minor sons were brought upon the record as his representatives, his widow Musammat

Mulo being their next friend. In addition to being next friend of her minor sons in this litigation Musammat Mulo was also on the 30th of April 1900 appointed by the District Judge as guardian of their persons and property under the Guardian and Wards Act. After the decision of their Lordships of the Privy Council, namely on the 20th of July 1903, the High Court transmitted their order to the Court below under section 610 of the Code of Civil Procedure with direction to carry it into execution. In these proceedings a pleader named Lekhraj Singh appeared for the minors filing his *vakalatnama* as pleader for them and for their next friend. He appears to have acted as such up to the 9th of May 1905. On that day, after the accounts had been rendered by both the parties, and it only remained to examine and consider these accounts, Lekhraj Singh informed the Court on the day fixed for the hearing that he had no instructions and could not proceed with the hearing. The Court intimating that the accounts had been filed and all that remained to be done was to examine them, adjourned the hearing, considered the accounts and passed a decree on the 16th of May 1905. Meanwhile Musammat Mulo had made an application to the Court of the District Judge stating that her son Ram Narain had attained his majority and that she was incapable of attending to the affairs of the minors and praying that she might be discharged from the post of guardian of their persons and property and that Ram Narain might be appointed guardian in her place. This application was granted on the 3rd of February 1904. No intimation however was given to the Subordinate Judge of the fact that Ram Narain had been appointed guardian in the place of Musammat Mulo, and no application was made on behalf of the minors for the substitution of his name as next friend in the suit which was then pending. This being so, Musammat Mulo continued to be the next friend for the purposes of the suit. The decree of the 16th of May 1905 did not satisfy the plaintiffs, and an application was made by Ram Narain on behalf of himself and his brothers for a reinstatement of the case and a rehearing after investigation of the accounts, alleging that they were not represented when the accounts were examined by the learned Judge. The Subordinate Judge refused this application for reasons which it is not

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necessary to criticise. No appeal was taken from his order, though it was appealable, and the decree of the 16th of May 1905 has become absolute. The suit out of which the present appeal has arisen was then launched, the sole prayer for specific relief being that the decree of the 16th of May 1905 may be set aside. The learned vakil for the respondents has been unable to refer us to any authority for the bringing of a suit in which the only relief claimed is the setting aside by a Subordinate Judge of a decree passed by his predecessor. It is true that the plaintiff claimed any other relief which might be just; but we do not think that this general prayer would justify the passing of an order which would have the effect of annulling a decree against which no appeal was preferred. Even if fraud on the part of the defendant appellant had been alleged, we do not think that the Court would have any jurisdiction to set aside the decree. If other relief had been prayed for and there were proof of fraud in obtaining the decree, it might be open to the Court to treat the decree as a nullity and to give suitable relief. But in this case fraud is neither alleged nor proved, and no specific relief is asked for, save and except the setting aside of the decree. On this subject we may refer to the ruling of this Court in the case of *Umrao Singh* v. *Hardeo* (1). The learned Subordinate Judge appears to us to have been under a misconception as to the difference between a next friend acting for minor plaintiffs in a suit, and a guardian appointed over the persons and properties of minor under the Guardians and Wards Act. He says in the course of his judgment that "the guardian's name nominally remained as guardian in suit No. 52 of 1895 after the 3rd of February 1904, when Musammat Mulo was removed from guardianship and Ram Narain, the plaintiff, was declared an adult and was appointed guardian of the other plaintiffs by order of the District Judge of Bareilly." He then held that if the plaintiffs had not been properly represented in the proceedings which resulted in the decree, the present suit was maintainable. He evidently considered that when Musammat Mulo was removed from the guardianship under the Guardians and Wards Act she ceased to act as next friend of the minors in the pending suit.

(1) (1907) I. L. R., 29 All., 418.

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Such was not the case. Mr. *Moti Lal* has pointed out the course which should have been adopted by the parties if she had desired to retire from the office of next friend in the pending suit. Section 447 of the Code of Civil Procedure directs that a next friend shall not retire at his own request without first procuring a fit person to be put in his place and without giving security for the costs already incurred. This provision of the Code was absolutely ignored by the parties. The Subordinate Judge seems to have considered that the appointment of Ram Narain by the District Judge as guardian under the Guardians and Wards Act was tantamount to his appointment as next friend for his minor brothers in the suit before the Subordinate Judge. We are not able clearly to understand the order which has been passed by him. Whilst setting aside the decree, which is the only relief which was sought, he has given a direction that the suit No. 52 of 1895, that is, the former suit, is to be restored to its original number on the file and that inquiries be made in accordance with the order of their Lordships of the Privy Council. We think that the suit was misconceived and that this appeal must be allowed. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts. We extend the time for payment of the amount due by the plaintiffs up to the 3rd January 1908.

Appeal decreed.

REVISIONAL CRIMINAL.

1907
July 16.

Before Mr. Justice Richards.

RAM DENI *v.* NAND LAL RAI.*

Criminal Procedure Code, section 195—*Sanction to prosecute—Jurisdiction to grant or revoke sanction.*

Application was made under section 195 of the Code of Criminal Procedure to a Magistrate of the third class, who tried the original case, for sanction to prosecute the complainant. This application was refused. A further application was then made to the District Magistrate, who granted sanction. *Held* that the Sessions Judge had no power to set aside the order of the District Magistrate granting sanction.

IN this case one Ram Deni filed a complaint in the Court of a Magistrate of the third class charging two persons, Nand Lal and

* Criminal Revision No. 336 of 1907.

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Jokhu, with an offence under section 323 of the Indian Penal Code. The persons complained against were tried and acquitted. Nand Lal then applied to the Court which had acquitted him, under section 195 of the Code of Criminal Procedure, for sanction to prosecute Ram Deni. The Court refused this application. Nand Lal then applied for sanction to prosecute to the District Magistrate. The District Magistrate reversed the order of the third class Magistrate and granted the sanction prayed for. The complainant Ram Deni then applied to the Sessions Judge to revise the order of the District Magistrate granting sanction. The Sessions Judge held that he had no jurisdiction to revise the District Magistrate's order and rejected the application. Ram Deni then applied in revision to the High Court.

Babu *Surendra Nath Sen*, for the applicant.

Mr. *M. L. Agarwala*, for the opposite party.

RICHARDS, J.—The circumstances of the present case are as follows:—Ram Deni made a complaint against Nand Lal and one Jokhu under section 323 of the Indian Penal Code. This prosecution resulted in the acquittal of Nand Lal and Jokhu. Nand Lal then applied to the Court which tried the original case for sanction, the application being made under section 195 of the Code of Criminal Procedure. That Court refused to sanction the prosecution against Ram Deni. Nand Lal applied to the District Magistrate. The District Magistrate granted sanction. Ram Deni then applied to the Sessions Judge to revoke that sanction. The Sessions Judge held that the District Magistrate was not an authority subordinate to him within the meaning of section 195(6) of the Code of Criminal Procedure. The present application is to review and set aside the order of the Sessions Judge on the ground that the application came regularly before him, and he ought to have gone into the merits and given a decision either revoking or confirming the sanction. Section 195 of the Code of Criminal Procedure provides that no Court shall take cognizance of certain offences without the previous sanction or on the complaint of the Court in which the offence was committed, or the sanction of some other Court to which such Court is subordinate. Sub-section (6) provides that any sanction given or refused under the section may be revoked or granted

by any authority to which the authority giving or refusing it is subordinate. Sub-section (7) provides that for the purposes of the section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie.

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RAM DENI v. NAND LAL RAI.

In the present case the charges against Jokhu and Nand Lal were tried in the Court of a Magistrate of the third Class. Appeals from him ordinarily lie to the District Magistrate. In my opinion the application for sanction having been made to the Court in which the proceedings were had and in respect of which sanction to prosecute was asked, the only Court to which an application under clause (6) could be made to revoke or grant the sanction was the Court of the District Magistrate, and that the view taken by the learned Sessions Judge was a correct view. I accordingly dismiss the application.

APPELLATE CIVIL.

1907 *December 2.*

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

GORDHAN DAS AND ANOTHER (PLAINTIFFS) *v.* CHUNNI LAL (DEFENDANT) *

Religious endowment—Trust—Uncertain—Income of villages to be applied to "charitable purposes" at a dharamshala which the settlor had founded.

By a deed of trust, or *bhentnama*, the owner of seven villages settled the income thereof to the extent of Rs. 500 a month to be applied to "charitable purposes" at a dharamsala which he had founded. In course of time one of the villages mentioned in the deed of trust was alienated by a person who was at the time acting as trustee. *Held*, on suit by the trustees to have the sale cancelled and to recover possession of the village, (1) that the trust was not void for uncertainty, and (2) that it was not competent to the court in the suit as framed to declare that the village in suit was charged with a proportionate part of the total income of the seven endowed villages. *Runchordas Vandravandas* v. *Parvatibai* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the appellants.

Babu *Jogindro Nath Chaudhri*, Mr. *M. L. Agarwala* and Lala *Kedar Nath*, for the respondent.

* First Appeal No. 199 of 1905, from a decree of Shankar Lal, Subordinate Judge of Agra, dated the 29th of June 1905.

(1) (1899) I. L. R., 23 Bom., 725.

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GORDHAN DAS v. CHUNNI LAL.

STANLEY, C.J., and BURKITT, J.—This is an appeal by the plaintiffs against a decree of the Subordinate Judge of Agra, in a suit brought by them as trustees for a declaration that certain property was endowed, and that the plaintiffs as such trustees might be put into possession of the village of Gauri, a portion of the endowed property. The Court below, while dismissing the plaintiffs' claim for possession, gave a declaration that mauza Gauri was charged with and subject to an annuity of Rs. 133-5-0 for the support of the alleged charity, and that the plaintiffs were entitled to realise this sum from the defendant during the continuance of the charity. Against this decree the plaintiffs have appealed. We have also before us an objection filed by the defendant respondent, under section 561 of the Code of Civil Procedure, the ground of objection being that the property is not endowed property.

The deed of endowment upon which the plaintiffs rely was executed by Rai Joti Prasad of Agra on the 20th of September 1861. In that document there is a recital that the executant had established a dharamshala at Benares for charitable purposes, and had carried on charity at a cost of Rs. 500 a month. Then it is recited that it was necessary to make a permanent arrangement for the continuance of the charity and for meeting the expenses connected with it, and that therefore the document was executed. In the operative part Joti Prasad purported to set apart the profits of seven villages, one of which is Gauri, for the expenses of the dharamshala and directed that the net profits of those villages should, to the extent of Rs. 500 a month, be applied to charitable purposes (*pun*) at the dharamshala and that the net profits of the villages should be deposited by way of trust with Bishambar Nath and Din Dayal or those whom they might appoint.

After the deaths of the trustees, their widows Rani Kanno Dei and Rani Hira Dei took upon them the management of the property comprised in the deed of endowment, and on the 12th of January 1903, Rani Hira Dei sold the village of Gauri to the defendant, Seth Chunni Lal, who is now in possession of it. By order of the 25th of January 1904, Hira Dei was removed from the office of trustee and the plaintiffs were appointed trustees of

the endowment. The suit out of which this appeal has arisen was then brought by them on the 17th of May 1904 and it is only concerned with the village of Gauri, the plaintiffs claiming possession of it alone. Seth Chunni Lal alone defended the suit, and his sole defence was that the property in dispute was not endowed property, and that the alleged deed of endowment was never acted on.

The learned Subordinate Judge held, and we think rightly, that only a portion of the profits, that is Rs. 500 a month, of the villages mentioned in the deed of endowment was dedicated for the purposes of the trust, and that the villages themselves were not vested in the trustees so as to entitle them to possession of them. The founder of the trust directed that the net profits of the villages to the extent of Rs. 500 a month only, and not the corpus, should be applied to charitable purposes, and be deposited by way of trust with the trustees. The plaintiffs, we think, are clearly not entitled to be put into possession of any of the villages. They are only entitled to receive Rs. 500 a month out of the profits of them. Their suit for possession was, therefore, misconceived. The learned Subordinate Judge came to the conclusion upon the evidence that Rs. 500 a month were never expended in the expenses of the charity, but that possibly the expenses might have been about Rs. 166 a month, and he held that the villages were only subject to a charge of Rs. 130 a month for the charity. His words are:—"I think it may be taken that the income of the villages in the *bhentnama* is subject to a charge of Rs. 130 a month for charity at Benares." He further found that the proportionate part of the charge, attributable to the village of Gauri, was a sum of Rs. 133-5-0 yearly. Accordingly, he gave a decree for this amount.

The plaintiffs appellants appeal against the decree contending that the village of Gauri was endowed property, and that upon the true construction of the *bhentnama* the corpus of the villages should have been held to be dedicated, and also relying on other grounds which it is unnecessary here to refer to.

Mr. *Chaudhri* on behalf of the respondent, supporting an objection filed under section 561 of the Code of Civil Procedure, contended that there was no valid endowment at all, the

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purposes of the trust being too indefinite and vague, and also that if the endowment was valid it was never acted on. He further objected to the form of the decree.

As to the first point raised by him, namely, that the trust could not be enforced, that the words translated "charitable purposes" are too vague and indefinite to create a valid trust, he relied upon the ruling of the Privy Council in the case of *Runchordas* v. *Parvatibai* (1) in which it was held that a bequest by a Hindu testator of movable property to trustees for "dharm" was void. The word "dharm," as was pointed out in that case, indisputably bears a broad signification, being so wide as to include philanthropy, or piety, or charity. In Wilson's Glossary of Judicial Terms "dharm" is defined to be "law, virtue, legal or moral duty." Their Lordships held that the objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control. The dedication in the case before us is for charitable purposes *(pun)*, and for charitable purposes alone. A trust for such purposes, that is, for charity generally, will always be carried out, notwithstanding that the objects of the charity are not specifically defined. The Court can, if necessary, in such a case, settle a scheme for its proper administration. There is nothing, therefore, in the first point which has been raised before us.

The next point raised by Mr. *Chaudhri* is that the evidence fails to show that the endowment was ever acted on, and reliance is placed upon the decision in the case of *Suppammal* v. *The Collector of Tanjore* (2). It will be seen from a reference to the judgment in that case that the evidence, so far from indicating an intention to constitute a trust, went to show that the parties never intended to give effect to the provisions of the deed, in fact the Court found that a trust was not created. In the course of his judgment Shephard, J. observes:—"It is true that neglect or breach of trust (*sic*) on the part of the trustees in acting in accordance with the direction of the founder, could not have the effect of annulling a properly constituted trust." We gather from this that if the court had found that there was a

(1) (1899) I. L. R., 23 Bom., 725. (2) (1889) I. L. R., 12 Mad., 387.

properly constituted trust, the fact that the trust was not carried out would not have the effect of annulling it. We think the Court below rightly decided that the trust existed.

Then the learned advocate for the respondent contended that in view of the frame of the suit, the plaintiffs were not entitled to the decree which they obtained for payment of a proportionate part of the charge created by the deed of endowment. We think that this branch of his argument is well founded. The relief which the plaintiffs claim is that they may be put into possession of the village of Gauri. They did not implead the persons who are interested in the other villages which are subject to the trust, and as they failed to establish their title to possession, it seems to us that it was not open to them to ask the Court to apportion the charge over the several villages, and to declare the village of Gauri liable to a specific portion of that charge. If their suit had been a suit for a declaration that the village of Gauri, together with the other villages named in the *bhentnama* were charged with the monthly payments mentioned in the instrument and for an apportionment of that charge, the plaint would have assumed a different form. The prayer for any other relief which might be deemed just, contained in the plaint, did not, as has been argued, justify in our judgment, the Court below in deciding as it did that Gauri was liable to a definite portion of the charge. In view of the frame of the plaintiffs' suit, we think that it ought to have been dismissed, notwithstanding that the plaintiffs may be able to establish that the village of Gauri is subject to a charge of Rs. 500 a month, for the charitable purposes mentioned in the trust deed. It will be open to the plaintiffs to institute a suit in the proper form.

We dismiss the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit. As the sole defence set up by the defendant was that the property was not dedicated, and as he has maintained this defence in his objection, we think that in the Court below the parties should abide their own costs. We now so order. We give the defendant respondent the costs of this appeal. We give no costs of the objection.

Appeal dismissed.

1907
December 7.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

SHAFAQAT ULLAH *v.* WALI AHMAD KHAN.*

Criminal Procedure Code, section 439—Revision—Practice—Discretion of Court as to entertainment of application in revision.

Held that it is not the practice of the High Court to entertain an application for revision on the criminal side, where there exists a lower Court having concurrent revisional jurisdiction, unless a similar application has first been made to the lower Court and has been rejected. *Emperor* v. *Kali Charan* (1) and *Gullay* v. *Bakar Husain* (2) followed.

THE facts of this case are as follows:—

ONE Shafaqat-ullah a zamindar of Sherkot in the Bijnor District made a complaint on the 10th August 1907 in which he made certain charges against Wali Ahmad Khan, Sub-Inspector of Police of that place. This complaint was inquired into at length by the District Magistrate, who dismissed it under section 203 of the Code of Criminal Procedure. The complainant thereupon applied to the High Court under section 437 of the Code asking for further inquiry into the subject matter of his complaint.

Mr. *G. P. Boys*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

KNOX, J.—This is an application under section 437 of the Code of Criminal Procedure asking this Court to set aside an order passed by the District Magistrate of Bijnor under section 203 of the Code and to pass an order for further inquiry. A preliminary objection has been taken to the hearing of this application on the ground that the applicant could have applied to the Sessions Judge and has not done so. In support of the objection my attention has been called to the cases *Emperor* v. *Kali Charan* (1) and *Gullay* v. *Bakar Husain* (2). I agree with what my learned brother has said in *Emperor* v. *Kali Charan*. The only circumstance in this case which might remove it from the category of ordinary circumstances is that an application has been deliberately made to this Court and it would save unnecessary distress to the applicant to hear him now rather than to send

* Criminal Revision No. 613 of 1907.

(1) Weekly Notes, 1904, p. 238. (2) (1905) I. L. R., 28 All., 268.

him to get the relief he seeks from the Sessions Judge. I do not think that this is sufficient. I can well conceive circumstances which might require that this Court should depart from its ordinary rule, and this is what is said in *Emperor* v. *Kali Charan.* I find no such circumstance in this case and therefore decline to exercise the power conferred by section 437 and reject the application. The applicant is of course at full liberty to apply to the Sessions Judge if he is so advised.

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APPELLATE CIVIL.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

HAIDAR HUSAIN AND OTHERS (DEFENDANTS) *v.* ABDUL AHAD AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code, section 362—Parties—Death of sole appellant.—All representatives not brought upon the record—Abatement of appeal.

The sole appellant, a Muhammadan, died pending the appeal, leaving him surviving a widow, two sons and two daughters. The two sons applied to have themselves brought on to the record as appellants, but did not ask that their mother and sisters should be made parties to the appeal. An application to that effect made by the respondents was not acted upon by the lower appellate Court. *Held* that it was the duty of the sons to have brought upon the record, either as appellants or respondents, the other representatives of their father, and, as they had not done so, the appeal abated. *Ghamandi Lal* v. *Amir Begam* (1) followed.

ONE Muhammad Naki brought a suit in the Court of the Munsif of Rasra against several defendants asking for the demolition of certain constructions which he alleged the defendants to have wrongfully erected and for possession of the land on which they stood. The Munsif dismissed the suit. The plaintiff appealed, but died shortly after the appeal was filed. He left two sons, a widow and two daughters. The sons applied to be brought upon the record of the appeal in place of their father and were so brought, but made no attempt to have the other representatives of the plaintiff made parties to the appeal. The respondents did make an application to that effect; the other representatives were served with notice of this application, but paid no

* Second Appeal No. 506 of 1906, from a decree of Sheo Prasad, Additional Subordinate Judge of Ghazipur, dated the 9th of April 1906, reversing a decree of Manmohan Sanyal, Munsif of Rasra, dated the 31st of August 1905.

(1) (1894) I. L. R., 16 All., 211.

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attention to it, and the Court under the circumstances declined to add them as appellants and directed the hearing to proceed. The appeal was allowed and the plaintiff's claim decreed. The defendants appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellants.

Mr. *Abdul Raoof* and Pandit *Moti Lal Nehru* for the respondents.

STANLEY, C.J., and BURKITT, J.—The suit out of which this second appeal has arisen was instituted by one Muhammad Naki. His suit was dismissed in the first Court, whereupon an appeal was filed by him, during the pendency of which he died leaving as his legal representatives, his widow, two sons and two daughters. The two sons applied to the Court to be brought upon the record as appellants, and they were so brought. Thereupon the defendants asked the Court to have the other representatives also brought upon the record. These representatives were served with notice of the application, but took no notice of it, and in view of their attitude the Court did not feel justified in adding them as appellants and declined to do so, directing that the hearing should proceed. It was obviously the duty of the two sons to apply to the Court to have the other representatives brought on the record either as appellants or as respondents but they neglected to take any steps in this direction. The result is that in accordance with the ruling of this Court in the case of *Ghamandi Lal* v. *Amir Begam* (1) the appeal abated. We had occasion to consider this ruling in the recent case of *Jugal Kishore* v. *The Collector of Bijnor* (2), and we approved of and followed it. It is too late now to ask us to pass an order upon the application of the defendants to bring the other representatives on the record, which was rejected by the Court below. The result is that the appeal to the lower appellate Court abated, and the decree obtained from that Court must be set aside and the decree of the Court of first instance restored with costs in all Courts.

Appeal decreed.

(1) (1894) I. L. R., 16 All., 211. (2) Second Appeal No. 52 of 1905.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1907
December 21.

ISMDAR KHAN AND OTHERS (DEFENDANTS) *v.* AHMAD HUSAIN (PLAINTIFF) AND HABIB-ULLAH KHAN (DEFENDANT).*

Mortgage—Usufructuary mortgage—Ouster of mortgagees—Adverse possession.

One of the purchasers of the equity of redemption in a usufructuary mortgage ousted the mortgagees and took possession of the entire mortgaged property, which he retained for more than twelve years; but it was found that he never denied the mortgagors' title, and that the mortgagors had no right to present possession. *Held* that there was no adverse possession as against the other mortgagors, although there was as against the mortgagees, and that the right of redemption was not lost: the ouster of the mortgagees did not entitle the plaintiff to re-enter into possession. *Muhammad Husain* v. *Mul Chand* (1), *Chinto* v. *Janki* (2), *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (3) and *Vithoba* v. *Gangaram* (4) referred to.

THIS was a suit brought by one Ahmad Husain for possession of 9 bighas and odd biswas of land, being three-fifths of 15 bighas and odd, and for mesne profits. The land in suit formed part of a larger quantity of land, which was the holding at fixed rates of one Rashida Bibi and was mortgaged by her under two mortgages, one executed in favour of Bahadur Ali and Saadat Beg and the other in favour of Aiyam-ud-din Khan. The mortgages were usufructuary, and the mortgagees were put in possession. Rashida Bibi died, leaving as her heirs her daughters Najman Bibi and Rabuan Bibi, who sold their equity of redemption to the plaintiff Ahmad Husain and to the first defendant Ismdar Khan on the 21st of June 1877. The former was the purchaser of a three-fifths share and the latter of the remainder. Other transactions relating to the property took place subsequently, to which it is not necessary to refer for the purposes of this report. The plaintiff claimed possession of his three-fifths share in the land in question on the allegation that the defendant Ismdar Khan had wrongfully dispossessed the mortgagees and taken possession, not only of his own share but also of the share of the plaintiff. The suit was resisted on various grounds, the main plea being that the claim was barred by limitation, the

* Second Appeal No. 998 of 1905, from a decree of Tajammul Husain, Subordinate Judge of Ghazipur, dated the 28th of July 1905, confirming a decree of Harimohan Banerji, Munsif of Ghazipur, dated the 12th of January 1905.

(1) (1904) I. L. R., 27 All., 395.
(2) (1892) I. L. R., 18 Bom., 51.
(3) (1878) I. L. R., 4 Calc., 327.
(4) (1875) 12 Bom., H. C. Rep., 180.

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dispossession of the mortgagees having taken place in June 1878, whilst the suit was not filed until July 1904. The court of first instance (Munsif of Ghazipur) overruled this objection and gave the plaintiff a decree for possession, but disallowed his claim for mesne profits. On appeal the lower appellate court (Subordinate Judge of Ghazipur) affirmed the decree of the court of first instance. Both sides appealed to the High Court; the plaintiff against the disallowance of his claim for mesne profits, the defendants against the rest of the decree. The defendants urged that the suit was barred by limitation inasmuch as they had held possession adversely to the plaintiff for more than 12 years; and also that in any case the plaintiff was not entitled to possession without redeeming them.

Mr. *M. L. Agarwala*, for the appellants.

Mr. *Muhammad Ishaq Khan*, for the respondents.

BANERJI and AIKMAN,—JJ.—This appeal and the connected appeal No. 997 arise out of a suit brought by the plaintiff Ahmad Husain for possession of 9 bighas and odd biswas of land, being three-fifths of 15 bighas and odd, and for mesne profits. The said land forms part of a larger quantity of land, which was the holding at fixed rates of one Rashida Bibi and was mortgaged by her under two mortgages, one executed in favour of Bahadur Ali and Saadat Beg and the other in favour of Aiyam-ud-din Khan. The mortgages were usufructuary and the mortgagees were put in possession. Rashida Bibi died, leaving as her heirs her daughters Najman Bibi and Rabuan Bibi, who sold their equity of redemption to the plaintiff Ahmad Husain and to the first defendant Ismdar Khan on the 21st of June 1877. The former was the purchaser of a three-fifths share and the latter of the remainder. Other transactions relating to the property took place subsequently, to which it is not necessary to refer for the purposes of these appeals. The plaintiff claimed possession of his three-fifths share in the land in question on the allegation that the defendant Ismdar Khan had wrongfully dispossessed the mortgagees and taken possession, not only of his own share, but also of the share of the plaintiff. The suit was resisted on various grounds, the main plea being that the claim was barred by limitation. The court of first instance overruled this plea and made a decree in the

plaintiff's favour for possession, but dismissed the claim for mesne profits. This decree having been affirmed by the lower appellate Court these two appeals have been preferred, one by the plaintiff and the other by the defendants. The plaintiff appeals against the portion of the decree which dismisses his claim for mesne profits. The defendants' appeal relates to the remainder of the claim.

The contentions urged on behalf of the defendants are that they have held possession for more than twelve years adversely to the plaintiff and the claim is therefore time-barred, and that in any case the plaintiff cannot obtain possession without redeeming the defendants.

Upon issues being referred by us to the Court below, that Court has found that the mortgagees were dispossessed by Ismdar Khan defendant in June 1878, but that he never denied the plaintiff's title, but on the contrary admitted it in a written statement and in a deposition. We have examined the written statement and the deposition referred to and are of opinion that they do not contain any admission of title. We must, however, accept the findings that the defendants dispossessed the mortgagees in June 1878 and that they never specifically denied the plaintiff's title.

As the defendants wrongfully dispossessed the mortgagees and themselves took possession, their possession was undoubtedly adverse to the mortgagees, and as this adverse possession has continued for a longer period than twelve years, the right of the mortgagees has under section 28 of the Limitation Act become extinct and has vested in the defendants. The possession of the mortgagees was not full proprietary possession but was possession of a limited nature. It is this possession of which they were deprived by the defendants; so that the adverse possession of the defendants was also of a limited character and had the effect of extinguishing the limited interests of the mortgagees and vesting those interests in the defendants. The possession of the defendants was not therefore adverse to the plaintiff. There may be cases in which adverse possession against the mortgagee would also be adverse possession against the mortgagor, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title

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of the mortgagor. But, as held in *Muhammad Husain* v. *Mul Chand* (1) following *Chinto* v. *Janki* (2), possession obtained by the ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also. In the present case it has been found that the title of the plaintiff was never denied by the defendants. It is also an admitted fact that when the defendants took possession, the persons entitled to remain in possession were the mortgagees and not the mortgagors, and that the mortgage was unsatisfied. As the plaintiff had therefore no right to immediate possession, the defendants cannot be held to have been in possession adversely to the plaintiff. As observed by Mr. Justice Markby in *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (3), by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some preson other than the true owner, the true owner having a right to immediate possession. We are therefore unable to accept the defendants' contention that their possession is adverse to the plaintiff and that the claim is time-barred.

We are, however, of opinion that the plaintiff is not entitled to recover possession without redeeming the mortgages to which his share is subject. As we have already pointed out, the defendants by virtue of their adverse possession against the mortgagees, acquired the rights of the mortgagees, and, as held in *Vithoba* v. *Gangaram* (4), succeeded only to such estate as the mortgagees possessed. The plaintiff, therefore, can only redeem the defendants, his equity of redemption being unaffectd by the possession of the defendants. The ouster of the mortgagees by the defendants did not entitle the plaintiff to re-enter into possession. A similar view was held by Fulton, J., in *Chinto* v. *Janki* (5). It is true the position of the defendants is that of co-mortgagors, but that circumstance does not, in our opinion, make any difference so far as the interests of the plaintiffs are concerned, it being an admitted fact that the mortgages have not been discharged. The claim for possession was not therefore maintainable. As the plaintiff did not seek to redeem the mortgages, the suit as brought ought to have been dismissed. This will not preclude

(1) (1904) I. L. R., 27 All., 395.
(2) (1892) I. L. R., 18 Bom., 51.
(3) (1878) I. L. R., 4 Calc., 327.
(4) (1875) 12 Bom., H. C. Rep., 180.
(5) (1892) I. L. R., 18 Bom., 51, at p. 54.

the plaintiff from bringing a properly framed suit for redemption. We accordingly allow this appeal, and, setting aside the decree of the Court below, dismiss the plaintiff's suit. Having regard to the circumstances of the case and the conduct of the parties we direct that they abide their own cost in all Courts.

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ISMDAR KHAN *v.* AHMAD HUSAIN.

Appeal decreed.

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

1908 *January 2.*

AJUDHIA AND OTHERS (DEFENDANTS) *v.* KUNJAL (PLAINTIFF) AND GAURI SHANKAR AND ANOTHER (DEFENDANTS).*

Bond—Instalments—Power to sue for whole amount on default of payment—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 75.

A bond payable by instalments contained a provision that in default of the payment of any one instalment it would be in the power of the creditor to sue for the whole amount due under the bond without waiting for the period provided for the payment of other instalments. *Held* that this provision did not mean that the creditor should be compelled to sue for the whole on default of payment of one instalment, nor did limitation in respect of the whole debt commence to run from the date of the first default. *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (1) and *Hurri Pershad Chowdhry* v. *Nasib Singh* (2) dissented from. *Shankar Prasad* v. *Jalpa Prasad* (3) and *Maharaja of Benares* v. *Nand Ram* (4) referred to.

THE facts of this case are as follows:—

On the 3rd of August 1891 one Debia, the father of some of the defendants, executed a bond payable by instalments of Rs. 50 annually in the month of Jeth in favour of Kashi Prasad. In May 1905 Kashi Prasad's representatives sold this bond to the plaintiff Kunjal. On the 21st of June 1905 Kunjal sued, making the representatives of the original obligor and obligees parties, to recover three instalments under the bond. The bond contained a provision that, in default of payment of any one instalment, it would be within the power of the creditor (*mahajan mazkurko ikhtyar hoga*) to sue for the whole amount due under the bond

* Second Appeal No. 489 of 1906, from a decree of Bepin Behari Mukerji, Judge of the Court of Small Causes exercising powers of a Subordinate Judge of Cawnpore, dated the 30th of April 1906, modifying a decree of Muhammad Azimuddin, Munsif of Fatehpur, dated the 18th of September 1905.

(1) (1904) I. L. R., 31 Calc., 297.
(2) (1894) I. L. R., 21 Calc., 542.
(3) (1894) I. L. R., 16 All., 371.
(4) (1907) I. L. R., 29 All., 431.

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without waiting for the period provided for the payment of other instalments. The Court of first instance (Munsif of Fatehpur) held that the effect of this provision was to compel the creditor to sue on default for recovery of the whole debt, and that the suit was barred by limitation, and accordingly dismissed it. On appeal, however, this decision was reversed and a decree given to the plaintiff against the sons of the obligor. The judgment-debtors appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondents.

KNOX and AIKMAN, JJ.—On the 3rd of August 1891 the father of the first four defendants executed a bond payable by instalments in favour of one Kashi Prasad, father of the remaining defendants. The bond contained a provision that in default of the payment of any one instalment it would be within the power of the creditor (*mahajan mazkurko ikhtyar hoga*) to sue for the whole amount due under the bond without waiting for the period provided for the payment of other instalments. The present suit is for the recovery of three instalments due under the bond. The Munsif held that the suit was barred by the provisions of article 75 of schedule II to the Indian Limitation Act, and dismissed the suit. The suit, we may here observe, was not for the enforcement of the option given by the bond, whereby the creditor could claim the whole amount unpaid. The plaintiff appealed. The learned Subordinate Judge in a very able judgment held that the claim was not barred. The defendants come here in second appeal and again contend that the plaintiff's cause of action arose upon the default made in the payment of the first instalment, and that the suit is therefore barred by limitation. There might have been some force in this contention if the suit had been to enforce the penalty and to recover the whole amount left unpaid by the bond. But the suit was only for the instalments unpaid at the time of the suit. In support of his argument the learned counsel referred us to decisions of the Calcutta High Court, namely, *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (1) and to the case upon which that decision is based, *viz.*, *Hurri Pershad Chowdhry* v. *Nasib Singh* (2).

(1) (1904) I. L. R., 31 Calc., 297. (2) (1894) I. L. R., 21 Calc., 542.

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The latter case has been expressly dissented from in Letters Patent, Appeal No. 81 of 1893, decided on the 10th of June 1894 in which the learned Judges held that the true rule of construction in cases of decrees for payment by instalments is to be found in the decision of this Court in *Shankar Prasad* v. *Jalpa Prasad* (1). These rulings are distinctly against the appellants here. We may also refer to what was said in *Maharaja of Benares* v. *Nand Ram* (2). We agree with the remarks of the learned Judges who held in the last-mentioned case that it would be very unfortunate if the view contended for by the appellant is sustained, as it would be to punish the creditor for forbearance shown to his debtor and compel him to press his demands at the earliest opportunity. It is conceivable that a bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occurred. The bond with which we have to deal is not so worded. It merely gives the creditor an option. We follow the law as laid down by this Court, and, with all deference to the learned Judges of the Calcutta High Court who have taken the opposite view, we are unable to agree with them. This disposes of the first ground of appeal. The only other ground was not argued. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908
January 4.

BAIJNATH SINGH (PLAINTIFF) *v.* PALTU AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act), section* 54—*Sale—Non-payment of consideration—Sale nevertheless complete.*

In a sale of immovable property non-payment of the purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser, and the purchaser can, notwithstanding such non-payment, maintain a suit for possession of the property. *Shib Lal* v. *Bhagwan Das* (3), *Umedmal Motiram* v. *Davu bin Dhondiba* (4) and *Sagaji* v. *Namdev* (5) followed.

IN this case the defendants sold to the plaintiff by a registered sale-deed dated the 6th of May 1898 a 4-pie share in certain

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* Second Appeal No. 1007 of 1906, from a decree of L. Marshall, District Judge of Banda, dated the 21st of August 1906, confirming a decree of Hamid Hasan, Munsif of Hamirpur, dated the 16th of May 1906.

(1) (1894) I. L. R., 16 All., 371.
(2) (1907) I. L. R., 29 All., 431.
(3) (1888) I. L. R., 11 All., 244.
(4) (1878) I. L. R., 2 Bom., 547.
(5) (1899) I. L. R., 23 Bom., 525.

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zamindari property. According to the sale-deed the consideration was agreed to be paid as follows, namely, Rs. 100 to be credited in part payment of past debts, Rs. 20 to be paid in cash, and the balance, Rs. 80, to be paid to a mortgagee of the property. Possession of the property sold not having been obtained, the purchaser sued for recovery of possession, alleging that the consideration for the sale had been paid in full. The Court of first instance (Munsif of Hamirpur) found that no portion of the consideration had in fact been paid and upon that ground dismissed the suit, and this decision was upheld on appeal by the District Judge. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Babu *Jogindro Nath Mukerji*, for the respondents.

STANLEY, C.J, and BANERJI, J.—This is a second appeal against a decree of the lower appellate Court dismissing the plaintiff's suit for recovery of possession of a 4-pie share in a village. This share was conveyed to the plaintiff by a sale deed of the 6th of May 1898, which was duly registered. Possession was not obtained, and the present suit was therefore brought. In his plaint the plaintiff alleged that the full consideration for the sale, namely, Rs. 200 had been satisfied. In their defence the defendants alleged that the consideration had not been paid, and it is found by both the lower Courts that this was so. In consequence of the finding that no portion of the consideration had been paid, the learned District Judge held that there was in fact no sale of the property. He observes in the course of his judgment:—"Thus not any portion of the consideration has been paid. Non-payment of the 'promised' portion would not invalidate the 'sale,' and the lower Court has recognised this principle. But when the consideration is supposed to be 'part paid and part promised' and not even the 'part paid' amount has actually been paid, the provisions of section 54 (of the Transfer of Property Act) have not been fulfilled and the transaction cannot be called a sale at all." We are unable to agree with the learned District Judge as to this. According to the sale deed the consideration was agreed to be paid as follows:—Rs. 100 to be credited in part payment of past debts, Rs. 20 to be paid in cash, and Rs. 80 the balance to be paid to a mortgagee of

the property. Now we must take it on the findings that no portion of the purchase money has been paid or satisfied. The vendee did not fulfil his obligation to pay it. It has been held, and we think rightly, that the non-payment of the purchase money does not prevent the passing of the ownership of purchased property from the vendor to the purchaser, and that the purchaser, notwithstanding such non-payment, can maintain a suit for possession of the property—see *Shib Lal* v. *Bhagwan Das* (1). It was so held in the case of *Umedmal Motiram* v. *Davu bin Dhondiba* (2) and again in the case of *Sagaji* v. *Namdev* (3), in which the evidence showed that there was a *bonâ fide* sale of property by the defendant to the plaintiffs, and it was held that this sale was a completed transaction, notwithstanding the fact that no portion of the consideration had been paid, and that the only remedy of the vendor for the consideration was a suit for recovery of the amount of it. We think therefore that the Courts below were wrong in dismissing the plaintiff's claim. In the case of *Shib Lal* v. *Bhagwan Das*, to which we have referred, it was laid down by Mahmood, J., rightly, we think, that equities may exist in favour of a defendant to a suit like the present one so as to subject the decree to restrictions and conditions appropriate to the circumstances of the case. Here there is such an equity arising out of the non-payment of the purchase money by the plaintiff, and regard ought to be paid to it in any decision which the Court may pass.

Accordingly we allow the appeal. We set aside the decrees of both the lower Courts, and we order and direct that if within six months from this date, the plaintiff pay to the defendants the sum of Rs. 200, the amount of the purchase money, the property mentioned in the plaint be delivered to him, but in default of such payment the plaintiff shall forfeit his right to recover the property. If the plaintiff do not pay the purchase money within the time aforesaid, his suit will stand dismissed with costs in all Courts. If he, however, do pay the purchase money within such period, then in view of the fact that the plaintiff alleged in his plaint that he had paid the entire of the purchase money, contrary

(1) (1888) I. L. R., 11 All., 244. (2) (1878) I. L. R., 2 Bom., 547.
(3) (1899) I. L. R., 23 Bom., 525.

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to the fact, we think that both parties should abide their own costs in the Courts below and we order accordingly. As to the costs of this appeal, the plaintiff, we think, if he pay the purchase money, is entitled to them, and we so order.

Appeal decreed.

1908 *January 4.*

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BHURA (PLAINTIFF) *v.* SHAHAB-UD-DIN (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 22—*Occupancy holding—Succession.*

Under the Agra Tenancy Act of 1901 the personal law of the parties concerned is no longer applicable to the case of succession to an occupancy holding, but the holding descends to all the male lineal descendants in the male line of descent of the last owner, without exclusion by the nearer of the more remote.

THE facts of this case are as follows. One Kallu had an occupancy holding. He also had three sons, Bhura, Nathu and Khuda Bakhsh. The two latter died in Kallu's life-time. In August 1904, after the death of Kallu, Bhura obtained from the Revenue Court a decree ejecting the sons of Nathu from a portion of the occupancy holding. The Court in that suit found that under section 22 of the Agra Tenancy Act, 1901, the nearer descendant excluded the more remote. The present suit was brought to eject Shahab-ud-din, the son of Khuda Bakhsh. This suit was brought in the Court of the Subordinate Judge of Dehra Dun, and was dismissed on the preliminary question of want of title in the plaintiff. The plaintiff appealed to the District Judge of Saharanpur, who agreed with the Court below. The plaintiff thereupon appealed to the High Court.

Pandit *Mohan Lal Nehru*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

STANLEY, C.J., and BURKITT, J.—In our opinion the decision of the learned District Judge affirming the decision of the Subordinate Judge is correct. The question is as to the interpretation to be put on the first clause of section 22 of the Agra Tenancy Act, II of 1901. That clause in the matter of the succession

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* Second Appeal No. 408 of 1906 from a decree of L. G. Evans, District Judge of Saharanpur, dated the 15th of March 1906, confirming a decree of S. P. O'Donnell, Subordinate Judge of Dehra Dun, dated the 9th of November 1905.

(*inter alia*) to an occupancy tenant provides that on the death of the tenant his interest in the holding shall devolve on his male lineal descendants in the male line of descent. The appellant and the respondent to this appeal are both male lineal descendants of the last tenant in the male line of descent. The appellant is his son, while the respondent is his grandson. As the respondent's father predeceased his father, the last tenant, the respondent would be excluded under the Rent Act of 1881, section 9, which by the words "as if it were land" made the personal law of the party applicable to the descent of an occupancy holding. The appellant therefore desires us to read into section 22 of the Act now in force, such words as would make the tenure descend as if it were land, thus excluding the respondent. As a reason for his contention his learned vakil pointed out that some unexpected results might follow from a literal interpretation of section 22. For instance, in the case of the death of a tenant leaving several sons, grandsons and even great-grandsons, he argues that under the words of section 22 the tenure might be held to devolve simultaneously on all.

As to that matter we do not consider it necessary to express any opinion now. There can be no doubt that the new Tenancy Act has completely altered the rule of devolution in the case of a tenancy such as that in question here. The tenancy no longer devolves "as if it were land," but on the lineal male descendants of the last tenant. The Legislature has chosen to alter the law, and we can see no reason why we should not assume that the new provision was deliberate and intentional. The parties here are Muhammadans, whose personal law gives a share in the estate of a deceased Muhammadan to daughters, wives, sisters and other females, who are excluded by the words "male lineal descendants" in section 22 of the new Act. If we apply the Muhammadan law for the purpose of excluding the respondent, it is difficult to see why we should not apply it to include females, whom the first clause of section 22 excludes when there are "lineal male descendants." We dismiss this appeal with costs.

Appeal dismissed.

1908
January 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

TEJPAL (PLAINTIFF) *v.* GIRDHARI LAL (DEFENDANT).*

Pre-emption—Mortgage—Property purchased by vendees subject to an unregistered mortgage—Pre-emptor bound to take the property subject to the mortgage.

Property the subject of a suit for pre-emption was purchased by the vendees subject to an unregistered mortgage for Rs. 99. *Held* that the pre-emptor must take the property subject to this unregistered mortgage irrespective of the question whether he had notice of it or not.

THIS was a suit brought to enforce payment of a sum of Rs. 129-3-0, secured by a mortgage of the 25th of November 1900, by sale, if necessary, of the mortgaged property. The principal amount secured by the mortgage was Rs. 95 and therefore the mortgage was not compulsorily registrable. After the execution of this mortgage, namely, on the 26th of January 1901, the mortgaged property was sold by Bahraich the mortgagor to Bhagwan Singh, Karan Singh and Tota Ram, and the purchase deed in their favour was duly registered. At the date of the sale the purchasers had notice of the unregistered mortgage, and therefore must be taken to have purchased the property subject to it. Subsequently the defendant respondent Girdhari Lal claimed a right to pre-empt this sale, and succeeded in his claim and obtained possession of the property. The plaintiff then brought the present suit, and it was defended by Girdhari Lal on the ground that at the time of pre-emption he had no notice of the plaintiff's mortgage and therefore was not bound by it. The Court of first instance (Munsif of Shikohabad) held that the defendant purchased subject to all the liabilities which attached to the property in the hands of the vendees, and was therefore liable to satisfy the mortgage. On appeal the lower appellate Court (Subordinate Judge of Mainpuri) reversed this decision, holding that the pre-emptor was not affected by the notice of the mortgage which the vendees had; that he had no knowledge of the mortgage when he pre-empted the sale, and that therefore the property in his hands was not liable for the mortgage debt. Against this decree the plaintiff appealed to the High Court.

* Second Appeal No. 608 of 1905, from a decree of A. Rahman, Subordinate Judge of Mainpuri, dated the 11th of April 1905, modifying a decree of Gokul Prasad, Officiating Munsif, Shikohabad, dated the 12th of May 1904.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The suit out of which this appeal has arisen was brought by the plaintiff to enforce payment of a sum of Rs. 129-3-0, secured by a mortgage of the 25th of November 1900, by sale, if necessary, of the mortgaged property. The principal amount secured by the mortgage was Rs. 95 and therefore the mortgage was not compulsorily registrable. After the execution of this mortgage, namely, on the 26th of January 1901, the mortgaged property was sold by Bahraich the mortgagor to Bhagwan Singh, Karan Singh and Tota Ram and the purchase deed in their favour was duly registered. At the date of the sale the purchasers had notice of the unregistered mortgage and therefore must be taken to have purchased the property subject to it. Subsequently the defendant respondent Girdhari Lal claimed a right to pre-empt this sale, and succeeded in his claim and obtained possession of the property. The plaintiff then brought his suit, and it was defended by Girdhari Lal on the ground that at the time of pre-emption he had no notice of the plaintiff's mortgage and therefore was not bound by it. The learned Munsif held that the defendant appellant purchased subject to all the liabilities which attached to the property in the hands of the vendees, and was therefore liable to satisfy the mortgage. On appeal the learned Subordinate Judge reversed this decision, holding that the pre-emptor was not affected by the notice of the mortgage which the vendees had; that he had no knowledge of the mortgage when he pre-empted the sale, and that therefore the property in his hands was not liable for the mortgage debt.

From this decision the appeal now before us was preferred. On behalf of the respondent reliance was placed upon section 50 of the Registration Act, which provides that every document of the kind mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section 17, which include a deed of sale, shall, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property and not being a decree or order. This section, it has been frequently held, does not protect a purchaser who purchased with knowledge of an

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unregistered incumbrance. Therefore it is clear that the vendees Bhagwan Singh, Tota Ram and Karan Singh were liable to satisfy Tejpal's mortgage. They in fact must be taken to have purchased the property subject to the mortgage.

The question then is, is the pre-emptor Girdhari Lal in any better position than the vendees? We think not, and for this reason: a right of pre-emption is not a right of repurchase, but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all the rights and obligations arising from the sale under which he derived his title. A person who chooses to pre-empt, therefore, must take upon him the burden of the obligations subject to which the sale was made as well as the benefits accruing therefrom. In other words, he can get no more than that for which the vendee bargained. The vendees in this case acquired the property subject to the plaintiff's mortgage, and the pre-emptor if he chose to pre-empt must also take subject to it. The pre-emptive property was not in fact an unincumbered property, but one subject to the plaintiff's mortgage, an incumbrance which the purchasers were liable to satisfy, and which the pre-emptor, who has enforced his right to have his name substituted as purchaser, must, we think, satisfy. The vendees had distinct notice of the incumbrance, and even if they concealed their knowledge of it from the pre-emptor, they cannot thereby give him a better right than that which they themselves possessed. The question may be looked at from another point of view. The consideration for the sale to the vendees was not alone the money actually paid in cash, but also the amount of the mortgage, for the payment of which they became responsible. In holding, therefore, that the pre-emptor is bound to satisfy the mortgage-debt, we simply require him as pre-emptor to pay the entire of the purchase money. It is well settled law in this Court that a pre-emptor must pre-empt the whole of the bargain between vendor and vendee or not at all. He cannot take a portion of it only. Here part of the bargain was that the vendees should accept the liability of the vendor in respect of the plaintiff's mortgage. Therefore the successful pre-emptor took subject to that liability.

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For these reasons we think that the lower appellate Court was wrong in reversing the decision of the learned Munsif. We therefore allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts. We extend the time for payment of the mortgage debt up to the 1st of April next.

Appeal decreed

1908 *January* 9.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

NIRANJAN (PLAINTIFF) *v.* GAJADHAR (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 177—*Question of proprietary title—Jurisdiction—Civil and Revenue Courts.*

Held that the question whether a tenant, defendant in a suit for ejectment, is a tenant of one kind or another is not a question of proprietary title within the meaning of section 177 of the Agra Tenancy Act, 1901. *Chhitar Singh* v. *Rup Singh* (1) dissented from.

THE facts of this case are as follows:—

Niranjan Ahir applied as owner of a fixed rate tenant's holding for ejectment of one Gajadhar from a small plot of land. Gajadhar pleaded that he was the fixed rate tenant entitled to the holding. The suit under section 58 of Act No. II of 1901 was tried by an Assistant Collector, who dismissed it. The plaintiff appealed to the Court of the District Judge upon the ground that a question of proprietary title, within the meaning of section 177 (*e*) of the Tenancy Act, had been in issue and was in issue in the appeal. The District Judge, however, being of opinion that no such question was involved, referred the case to the High Court under section 195 of the Tenancy Act in view of the decision in *Chhitar Singh* v. *Rup Singh* (Weekly Notes, 1906, p. 247).

Babu *Parbati Charan Chatterji*, for the respondent.

KNOX and AIKMAN, JJ.—On the facts stated by the learned District Judge of Jaunpur we hold that no question of proprietary title was in issue in the Court of first instance and that no such question is a matter in issue in this appeal. The learned District Judge is right therefore in his view that he had no

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*Miscellaneous No. 268 of 1907 on a reference made by W. R. G. Moir, District Judge of Jaunpur, dated the 26th of July 1907, against the order of Rup Narain, Assistant Collector, First Class, of Jaunpur, dated the 27th of November 1906.

(1) Weekly Notes, 1906, p. 247.

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jurisdiction to entertain the appeal. The opposite view may perhaps derive some support from the observations made towards the conclusion of the judgment in *Chhitar Singh* v. *Rup Singh* (1), but, with all deference to the learned Judge who decided the case, we are unable to agree with him in holding that, when there is a question whether one party or the other is the cultivator of specified land, a question of proprietary title arises. This is our answer to the reference.

1908 *January* 18.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

GANGA DEI (PLAINTIFF) *v.* BADAM AND OTHERS (DEFENDANTS).*

Land holder and tenant—Trees—Land holder's and tenant's rights as to trees on tenant's holding.

Held that as a general rule the property in timber growing on a tenant's holding vests in the zamindar, and the tenant has no right to cut and remove such timber. But as a general rule also the zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding so long as the relation of landlord and tenant subsists. *Sheik Abdool Rohoman* v. *Dataram Bashee* (2) referred to.

THE plaintiff in this case sued as zamindar of a village called Kanchanpur praying for a declaration of her title to the trees growing on the cultivated and uncultivated lands of Kanchanpur in the possession of the defendants, who were her tenants, and also for a perpetual injunction prohibiting the defendants from offering any obstruction to the cutting down and removal by her of the trees on their holding. The defendants set up a right by custom to cut the trees in question, but this plea was rejected, and a declaration of title was given to the plaintiff as prayed for in her plaint. The Court of first instance (first Additional Munsif of Meerut) also granted the plaintiff the injunction prayed for, and this decree was upheld in appeal by the lower appellate Court (Additional District Judge of Meerut). The defendants appealed to the High Court, where, the case coming before a Single Judge of the Court, the only question argued was as to the right of the plaintiff to the injunction which she

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* Appeal No. 49 of 1907 under section 10 of the Letters Patent from a judgment of Richards, J., dated the 18th of April 1907.

(1) Weekly Notes, 1906, p. 247.

(2) Weekly Reporter, January to July 1864, page 367.

had obtained—*Cf.* Weekly Notes, 1907, p. 150. The result of this appeal was that the decrees of the Courts below were set aside so far as they granted an injunction to the plaintiff restraining the defendants from offering obstruction to the plaintiff in cutting down, removing and selling the trees (other than the trees actually cut). The plaintiff then preferred the present appeal under section 10 of the Letters Patent.

Babu *Durga Charan Banerji*, for the appellant.

Mr. *R. Malcomson* for the respondents.

STANLEY, C.J., and BURKITT, J.—The plaintiff appellant is a zamindar, and as such instituted the suit out of which this appeal has arisen for a declaration of her title to the trees growing on the cultivated and uncultivated land in mauza Kanchanpur in the possession of the defendants, who are her tenants. She also prayed for a perpetual injunction prohibiting the defendants from offering any obstruction to the cutting down and removal by her of the trees on their holdings. The defendants set up a right by custom to cut the trees in question, but this plea was rejected, and a declaration of title was given to the plaintiff appellant as prayed for in her plaint. The two lower Courts also granted to the plaintiff appellant the relief which was claimed by way of injunction; but upon appeal our brother Richards reversed their decrees and allowed an appeal in respect of the injunction. From this decision the present appeal has been preferred under the Letters Patent. We are of opinion that the learned Judge of this Court was perfectly right in the decision at which he arrived. The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the zamindar, and that the tenant has no right to cut and remove such timber. But it appears to us to be clear that in the absence of a custom or of a contract to the contrary a zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists. A tenant has a right to enjoy all the benefits of the growing timber on his land during his occupancy. If the zamindar desire to have the privilege during a tenancy of entering upon his tenant's holding and cutting down and removing timber he must procure a special stipulation from his tenant in

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that behalf. In the case of *Sheikh Abdool Rohoman* v. *Dataram Bashee* (1) the learned Judges laid down that while a zamindar has a right in the trees which the Court should maintain, the tenant has a right to enjoy all the benefits that the growing timber may afford him during his occupancy, but has no power to cut down the timber and convert it to his own use. We hold therefore that our learned brother was correct in his decision and we accordingly dismiss the appeal with costs.

Appeal dismissed.

1908 *January* 18.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

SHEORAM TIWARI (DEFENDANT) *v.* THAKUR PRASAD AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 578—*Procedure—Irregularity—Disposal of a suit on a Sunday.*

Held that the fact that a suit was decided on a Sunday did not vitiate the decree. *Semble* that the Lord's Day Act (21 Geo. III, Cap. XLIX) does not apply to India. *Param Shook Doss* v. *Rasheed Ood Dowlah* (2) referred to.

THIS was a suit for a declaration of the plaintiffs' ownership of a certain wall and for an injunction against the defendant's interfering with it. The suit was filed in the Court of a Munsif. During the proceedings the Munsif made an inspection of the spot on Sunday, the 18th of June 1905. While he was there the parties came to terms. Thereupon a rubkar was drawn up then and there compromising the case. This was signed by the pleaders on either side, and the Munsif on the same day wrote and signed his judgment. The defendant appealed upon the sole ground that the decree was void, the suit having been decided on a Sunday. The District Judge dismissed the appeal. The defendant then appealed to the High Court, and his appeal coming before a single Judge of the Court was dismissed (*Cf.* Weekly Notes, 1907, p. 168). The present appeal was thereupon preferred by the defendant under section 10 of the Letters Patent.

Babu *Satya Chandra Mukerji*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

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* Appeal No. 51 of 1907 under section 10 of the Letters Patent from a judgment of Griffin, J., dated the 1st of May 1907.

(1) Weekly Reporter, January to July 1864, page 367.

(2) (1874) 7 Mad., H. C., Rep., 285.

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STANLEY, C.J., and BURKITT, J.—We are of opinion that the proceeding of the Munsif was not vitiated by the fact that it was taken on a Sunday. At the utmost it seems to us that the proceedings may have been irregular, but that any irregularity was cured by the consent of the parties. It is not necessary for us to determine whether the Lord's Day Act applies to this country, but we should be slow to hold that it did, as it would be manifestly inconvenient to do so, the Act being entirely unsuited to the circumstances of the country. We may mention that in the case of *Param Shook Doss* v. *Rasheed Ood Dowlah* (1) it was held that it had no application in this country. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

1908 *January* 28.

MAHADEO PRASAD (OPPOSITE PARTY) *v.* BINDESHRI PRASAD (APPLICANT). *

Act No. VIII of 1890 (*Guardians and Wards Act*)—*Guardian and minor*—*Arbitration—Appointment of guardian not to be settled by arbitration.*

The appointment of a guardian to a minor, not being a matter of private right as between parties, is not a question which can be settled by reference to arbitration.

THE facts of this case are as follows:—One Bindeshri Prasad, the managing member of a joint Hindu family governed by the Mitakshara, applied to the District Judge of Allahabad under section 10 of the Guardians and Wards Act (No. VIII of 1890) to be appointed guardian of the person and property of his minor brother Kedar Nath. The application was opposed by Sukhdeo Ram and Mahadeo Prasad, grandfather and father of Kedar Nath's wife, Musammat Janki.

The District Judge with the consent of the parties referred the matter to the arbitration of a gentleman of high social position, Kunwar Bharat Singh, and the arbitrator by his award dated the 4th March 1907 recommended that Bindeshri Prasad be appointed guardian of the person and property of Kedar Nath. In accordance with this award the District Judge on the 30th of April 1907 appointed Bindeshri to be the guardian of the person and

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* First Appeal No. 71 of 1907 from an order of C. Rustomjee, District Judge of Allahabad, dated the 30th of April 1907.

(1) (1874) 7 Mad., H. C., Rep., 285.

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property of the minor. Mahadeo Prasad appealed to the High Court against this order, one of the grounds of appeal being that the District Judge had no power to refer the matter to arbitration and to accept the award.

Babu *Satya Chandra Mukerji* (for whom Lala *Kedar Nath*,) the appellant.

Dr. *Satish Chandra Banerji* (for whom Babu *Lalit Mohan Banerji*), for the respondent.

AIKMAN, J.—This is an appeal from an order of the learned District Judge of Allahabad appointing a guardian of the person and property of a minor named Kedar Nath under the provisions of the Guardians and Wards Act, 1890. The appellant is the father-in-law of the minor. The respondent, who was appointed guardian by the learned Judge, is the minor's elder brother. Each of the parties to this appeal claimed to be appointed guardian. It appears that on the joint application of the parties the question as to who should be appointed guardian was referred to the arbitration of Kunwar Bharat Singh, a gentleman against whom no imputation whatever is made. It appears from the order of the learned Judge that he decided the question as to who should be the guardian solely on the award of the arbitrator. In appeal here it is contended that under Act No. VIII of 1890 the District Judge was not competent to refer to an arbitrator the question as to who should be appointed guardian. In my opinion this contention must prevail. Some special Acts, for instance, the Act dealing with religious endowments, No. XX of 1863, empower a Court to refer matters in difference to arbitration. No such power is given in the Guardians and Wards Act, and it is easy to understand why this should be so. When there are rival claimants to be appointed as guardian these claimants are not in the position of ordinary litigants who can refer any matter in dispute between them to a tribunal selected by themselves. The guiding principle in appointing a guardian is the consideration of what is best for the welfare of the minor. In my opinion the intention of the law is that the question as to who is the best guardian of the minor's interests is one to be decided by the Court, and that a Court cannot delegate its functions to any arbitrator, however competent and above suspicion that arbitrator

may be. If rival claimants to a certificate of guardianship are allowed to refer the dispute between them to an arbitrator, a door would be open to collusion and the interests of minors might suffer. For these reasons I am of opinion that this appeal must be sustained.

KARAMAT HUSEIN, J.:—This is an appeal from an order passed by the learned District Judge of Allahabad under the Guardians and Wards Act (No. VIII of 1890). The facts are these:—One Bindeshri Prasad, the managing member of a joint Hindu family governed by the Mitakshara, applied to the District Judge of Allahabad under section 10 of the Guardians and Wards Act (No. VIII of 1890) to be appointed guardian of the person and property of his minor brother Kedar Nath. The application was opposed by Sukhdeo Ram and Mahadeo Prasad, grandfather and father of Kedar Nath's wife, Musammat Janki.

The learned District Judge with the consent of the parties referred the matter to arbitration, and the arbitrator by his award, dated the 4th March 1907 recommended that Bindeshri Prasad be appointed guardian of the person and property of Kedar Nath. In accordance with this award the learned District Judge on the 30th of April 1907 appointed Bindeshri to be the guardian of the person and property of the minor. Mahadeo Prasad appeals to this Court against this order. One of the grounds of appeal is that the learned District Judge had no power to refer the matter to arbitration and to accept the award.

This objection is in my opinion sound. The State is theoretically the guardian of all its minor subjects. As an old writer observes, "the law protects their persons, their rights and estates, excuseth their laches and assists them in their pleadings; the judges are their counsellors, the jury are their servants and the law is their guardian"—(Trevelyan on the law relating to minors, page 15). The State being the guardian of all minor subjects delegates by legislation its guardianship to such of its tribunals as it deems fit. In British India the guardianship of the person and property of minors has been given to District Courts, and they have been authorized to appoint guardians in certain specific ways. The law on the subject is now contained in the Guardians and Wards Act (No. VIII of 1890.) The course to be followed

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by the District Court in appointing or declaring a guardian is prescribed in sections 11 (1), 13, 17 and 46. Under section 13 it shall hear such evidence as may be adduced in support of or in opposition to the application. Under section 17 it shall be guided by what . . . . . appears . . . . . to be for the welfare of the minor. Section 46 allows the District Court to call upon the Collector or upon any Court subordinate to it for a report on any matter arising in any proceeding under the Act and treat the report as evidence.

Such are the powers given by the Act to a District Court for the purpose of appointing or declaring a guardian of the person or the property of a minor. There is nothing in the Act to authorize a District Court to refer the question of the appointment or declaration of a guardian to arbitration. The learned District Judge had, therefore, no power to refer that matter to arbitration.

It might be contended that section 647 of the Code of Civil Procedure empowered the learned District Judge to make such reference, but there is no force in this contention. The section in my opinion deals with procedure, and procedure alone, and does not touch the substantive law of arbitration. The reference by the learned District Judge in the case before me was no doubt made with the consent of the parties, but that would give him no power. Besides, a party is allowed by law to submit any dispute regarding any right of his own to arbitration, but the question of guardianship stands upon a different footing and is not one of the private civil rights of any private person.

For the above reasons I hold that the course adopted by the learned District Judge was contrary to law and I therefore set aside his order and remand the case under section 562 of the Code of Civil Procedure with directions to readmit the application under its original number in the register and proceed to determine it in accordance with law.

BY THE COURT.—The appeal is allowed, the order of the learned District Judge is set aside, and the case is remanded to his Court with directions to readmit the application under its original number in the register and proceed to determine it according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

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January 28.

MAKUND RAO (OBJECTOR) *v.* JANKI BAI AND ANOTHER (DECREE-HOLDER).*

Act (Local) No. I of 1903 *(Bundelkhand Encumbered Estates Act), sections* 2 *and* 12—*Joint decree—Execution of decree—Effect of some out of several joint judgment-debtors taking advantage of the Act.*

Five out of six joint judgment-debtors took the benefit of the Bundelkhand Encumbered Estates Act, 1903. A notification was issued under the Act, but the decree-holders did not make any claim within the time prescribed. *Held* that the decree-holders could not recover from the judgment-debtor who had not taken advantage of the Act anything more than his proportionate share of the judgment debt.

THE facts of this case are as follows:—

On the 9th of June 1893 Musammat Janki Bai and Musammat Lachmi Bai obtained a decree against six persons, namely, Atma Ram, Sita Ram, Balkishen, Raghunath, Krishan and Madho Rao. The decree was for a sum of Rs. 5,091-9-0 with interest and costs. After this decree was passed, all the judgment-debtors with the exception of Madho Rao took the benefit of the Bundelkhand Encumbered Estates Act, 1903. A notification was issued calling upon creditors to submit their claims. The decree-holders put in their claim against the applicants, but they did not come in within the time required by the Act, and their claim was rejected. The decree-holders then applied for execution of their decree against the son of Madho Rao, and sought to execute the whole decree against him. The judgment-debtor objected that under the circumstances he was only liable for his proportionate share of the decretal amount. This plea was, however, rejected, and the first Court ordered execution to proceed against Makund Rao for the whole amount. Makund Rao thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Iswar Saran*, for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.—This appeal arises out of an application to execute a decree, dated the 9th of June 1893, which was passed in favour of the respondents Musammat Janki Bai and Musammat Lachmi Bai against six persons, namely, Atma Ram, Sita Ram, Bal Kishen, Raghunath, Krishan and Madho Rao. The appellant here is the son of the last-named

* First Appeal No. 134 of 1906, from a decree of Parmatha Nath Banerji, Subordinate Judge of Jhansi, dated the 17th of February 1906.

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judgment-debtor. The decree was for the sum of Rs. 5,091-9-0 and for costs and interest. It appears that all the judgment-debtors save Madho Rao took the benefit of the Bundelkhand Encumbered Estates Act, 1903. The usual notification was issued calling upon creditors to submit their claims. The respondents decree-holders put in their claim against the applicants, but, unfortunately for themselves, they did not put forward their claim within the time required by the Act, and the Special Judge refused to consider it. Now there is in the Act a very stringent provision to be found in section 12, which runs as follows:—"Every claim against the proprietor in respect of a private debt shall, unless made within the time and in the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged." That the judgment debt is a private debt within the definition of section 2 of the Act does not admit of any doubt. It follows from the provisions of section 12 that, so far as the liability of the five judgment-debtors who took advantage of the Act is concerned, the decretal debt must be deemed to have been duly discharged. As the respondents decree-holders could not proceed against the other judgment-debtors, they seek now to recover from the appellant the whole of the judgment-debt. The appellant took objection in the Court below that under the circumstances he was only liable for his proportionate share of the decretal amount. This objection was overruled by the learned Subordinate Judge who held that the decree being a joint one each judgment-debtor is liable for the whole of it. This is no doubt true, but we are of opinion that the learned Subordinate Judge did not give due effect to the terms of section 12 of Local Act No. I of 1903 quoted above. No doubt when a joint decree is passed against several judgment-debtors the decree may be executed against any one of these judgment-debtors, and if one of them satisfies the whole of the decree he would have his remedy by taking proper steps to enforce a right of contribution against his co-judgment-debtors. But even a joint decree can only be executed for such part of the decretal debt as has not been discharged. In our opinion the effect of section 12 of the Encumbered Estates Act is to discharge the decree to the extent of the joint liability of

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the five judgment-debtors who took advantage of the Act. It appears to us that the respondents cannot treat the provisions of this section as a nullity and seek to enforce a judgment debt which has by the provisions of the law been *pro tanto* duly discharged. If the appellant had to satisfy the whole of the debt, we are of opinion he could not enforce any right of contribution against his co-judgment-debtors, as they could rely on the terms of the Act and plead in answer to a suit for contribution that their share of the judgment debt must be deemed for all purposes to have been discharged. This result would be owing, not to any fault on the part of the appellant, but to the laches of the respondents in not having put forward their claim before the Special Judge within the time allowed by law. We think, therefore, that the order of the Court below disallowing the appellant's objection was wrong. We allow the appeal, and, setting aside the order of the Court below, remand the case to that Court with directions to proceed with the execution on the basis that the appellant is not liable for the whole of the judgment-debt but only for his proportionate share thereof. The appellant will recover from the respondent $\frac{11}{12}$ of the costs incurred by him in this Court. The respondents will recover from the appellant $\frac{1}{12}$ of the costs incurred by them in this Court. The costs in the Court below will abide the result.

Appeal decreed.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

1908 *January* 29.

FIROZI BEGAM (PLAINTIFF) *v.* ABDUL LATIF KHAN AND ANOTHER (DEFENDANT).*

Civil Procedure Code, section 549—Security for costs—Non-compliance with order for security—Appeal rejected—Application to restore appeal—Application refused.

Held that no appeal will lie from an order refusing to readmit an appeal which had been rejected under section 549 of the Code of Civil Procedure on account of non-compliance with an order to furnish security for costs. *Lekha* v. *Bhauna* (1) followed. *Kuar Balwant Singh* v. *Kuar Doulut Singh* (2) distinguished.

IN this case one Musammat Firozi Begam, a lady residing in the Rampur State, instituted a suit in the Court of the

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* First Appeal No. 24 of 1907, from an order of D. R. Lyle, District Judge of Moradabad, dated the 16th of February 1907.

(1) (1895) I. L. R., 18 All., 101. (2) (1886) L. R., 13 I. A., 57.

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Subordinate Judge of Moradabad to recover a sum of money on account of her dower. The suit was based upon a judgment which the plaintiff had obtained from a Court in Rampur against her husband Abdul Latif Khan. The suit was dismissed. The plaintiff appealed. On the 3rd of November 1906, on an application by the respondent, the appellant was ordered to find security for costs under the provisions of section 549 of the Code of Civil Procedure, and the 15th of December 1906 was fixed as the time within which the security was to be furnished. The security was not furnished within time. On the 19th of December the appellant applied for extension of time, but her application was not allowed, and on the following day the appeal was rejected under the provisions of section 549. On the 15th of February 1907 the appellant again applied to the Court asking that the security might be accepted and the appeal restored to the file. This application also was rejected. The appellant appealed to the High Court against the order of the Subordinate Judge rejecting her application for readmission of her appeal in the Court below.

Mr. *Abdul Majid* and Maulvi *Muhammad Ishaq*, for the appellant.

Dr. *Tej Bahadur Sapru*, for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.—The appellant is a lady residing in the Rampur State, that is, out of British India. She brought a suit in the Court of Subordinate Judge of Moradabad to recover a sum of money on account of her dower. The suit was based on a judgment which she had obtained from a Court in Rampur against her husband, the respondent Abdul Latif Khan. Her suit was dismissed. She appealed. On the application of the respondent, she was on the 3rd of November 1906 ordered by the appellate Court to furnish security for costs under the provisions of section 549 of the Code of Civil Procedure. The 15th of December 1906 was the time fixed within which the security had to be furnished. The appellant did not furnish the security within that time. On the 19th of December 1906, she asked for an extension of time within which to file the security. Although the time had expired, the learned Judge had authority to extend the time, *vide* decision of the Privy Council in *Budri*

Narain v. *Mussummat Sheo Koer* (1). Unfortunately for the appellant the learned Judge refused to extend the time. He sets out in his order of the 19th December 1906 that the appellant had been allowed six weeks within which to furnish the security. This he considered ample time, and he remarks that no attempt was made to have that time extended, meaning clearly, no attempt within the time allowed. He adds:—"I see no sufficient reason for allowing this application or for extending the time allowed and consequently refuse the application." On the following day he rejected the appeal under the provisions of section 549 of the Code of Civil Procedure. On the 15th February the appellant presented another petition asking to be allowed to deposit security and that the appeal might be restored to its original number. In support of her application she relied on a decision of the Privy Council in *Kuar Balwant Singh* v. *Kuar Doulut Singh* (2). The learned Judge held that that case was very different from the one with which he had to deal and refused to restore the appeal. It is against that order that the present appeal has been preferred. For the respondents a preliminary objection is raised that no appeal lies. It is noticeable that there is no provision in the Code similar to that contained in the second paragraph of section 381 which allows a plaintiff, whose suit has been dismissed for failure to furnish security for costs, to apply for an order to set the dismissal aside. Nor can we find in the Code any right of appeal given from an order refusing to readmit an appeal under the circumstances set forth above. In reply to the preliminary objection the learned vakil for the appellant relies on the Privy Council decision cited above. The facts of that case were of a peculiar nature and in our opinion the learned Judge is right in holding that it is distinguishable from the present case. We are compelled therefore to sustain the preliminary objection. At the same time we take the opportunity of expressing our opinion that, considering the serious consequences entailed by an order under section 549, it would be well if the Legislature should consider whether it is not advisable to embody in the new Code of Civil Procedure some provision analogous to that contained in the second paragraph of section 381 and to

(1) (1889) L. R., 17 I. A., 1. (2) (1886) L. R., 13 I. A., 57.

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give a right of appeal from orders passed under section 549. But as the law at present stands we can find no provision in it under which this appeal can be brought. We may mention that a Full Bench of this Court has held in *Lekha* v. *Bhauna* (1) that an order rejecting an appeal under section 549 is not appealable either as an order or as a decree. The case may be a hard one, but under the circumstances we have no alternative but to sustain the respondent's preliminary objection and dismiss the appeal, which we hereby do. Under the circumstances of the case we make no order as to costs.

Appeal dismissed.

1908 *January* 29.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

KISHAN LAL (DECREE-HOLDER) *v.* UMRAO SINGH (JUDGMENT-DEBTOR).*

Act No. IV of 1882 *(Transfer of Property Act), section* 99—*Civil Procedure Code, section* 316—*Mortgage—Simple money decree accepted by mortgagee—Sale of mortgaged property in execution of such decree.*

Even though the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money decree he is precluded by section 99 of the Transfer of Property Act, 1882, from bringing the mortgaged property to sale in execution of the simple money decree. *Madho Prasad Singh* v. *Baijnath* (2) followed. But if such a sale does in fact take place and is confirmed and a certificate is granted to the auction purchaser the sale cannot afterwards be impeached upon the ground that it was in violation of section 99 of the Transfer of Property Act. *Madan Makund Lal* v. *Jamna Kaulapuri* (3), *Raj Kishore De Sarkar* v. *Dina Nath Chandra* (4), *Thaleri Pathumma* v. *Thandora Mammad* (5), *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (6) and *Umed* v. *Jas Ram* (7) referred to. *Sonu Singh* v. *Bihari Singh* (8) dissented from.

THE facts of this case are as follows :—

One Umrao Singh on the 13th of November 1895 mortgaged certain property to one Kishan Lal. The mortgagee brought a suit against the mortgagor. In that suit he abandoned his rights under the mortgage and obtained a simple money decree on the 25th of March 1901. This decree he assigned to another Kishan Lal, who applied on the 22nd of November 1902 for attachment

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* First Appeal No. 22 of 1907, from an order of K. M. Ghosh, Additional District Judge of Aligarh, dated the 17th of January 1907.

(1) (1895) I. L. R., 18 All., 101.
(2) Weekly Notes, 1905, p. 152.
(3) Weekly Notes, 1907, p. 48.
(4) (1908) 12 C. W. N., lx.
(5) (1899) 10 M. L. J., 110.
(6) (1899) I. L. R., 26 Calc., 727.
(7) (1907) I. L. R., 29 All., 612.
(8) (1905) I. L. R., 33 Calc., 283.

and sale of the property which had been mortgaged to his assignor. The property was attached and a proclamation of sale issued under section 287 of the Code of Civil Procedure. On the 18th of April 1903 the judgment-debtor asked for postponement of the sale in order that he might raise the amount of the decree. This application was refused. On the 20th of July 1903 the property was sold and purchased by the assignee of the decree. On the 19th of August 1903 the respondent judgment-debtor applied under section 311 of the Code of Civil Procedure to have the sale set aside. On the 12th of September 1903 this application was rejected, and on the 22nd of that month the sale was confirmed. It appears from the record that a sale certificate was granted to the assignee of the decree, who is now in possession. On the 6th of June 1906, nearly three years after the sale, the judgment-debtor applied to the Court to set aside the sale on the ground of its having been held in contravention of the provisions of section 99 of the Transfer of Property Act. The Court of first instance (Munsif of Kasganj), disallowed this application on the ground that it was too late. On appeal by the judgment-debtor the lower appellate Court (Additional District Judge of Aligarh) reversed the decision of the Munsif and remanded the case to the Court of first instance under section 562 of the Code of Civil Procedure for decision on the merits. Against this order the decree-holder appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Babu *Sarat Chandra Chaudhri*), and *Gulzari Lal*, for the appellant.

Dr. *Tej Bahadur Sapru*, for the respondent.

AIKMAN and KARAMAT HUSEIN, JJ.—This is an appeal from an order of remand made by the learned Additional Judge of Aligarh in execution proceedings. The respondent Umrao Singh on the 13th of November 1895 mortgaged certain property to one Kishan Lal. The mortgagee brought a suit against the respondent. In that suit he abandoned his rights under the mortgage and obtained a simple money decree on the 25th of March 1901. This decree he assigned to the present appellant, who applied on the 22nd of November 1902 for attachment and sale of the property which had been mortgaged to his assignor. The property was attached and a proclamation of sale issued under section

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287 of the Code of Civil Procedure. On the 18th of April 1903 the judgment-debtor asked for postponement of the sale in order that he might raise the amount of the decree. This application was refused. On the 20th of July 1903 the property was sold and purchased by the present appellant. On the 19th of August 1903 the respondent judgment-debtor applied under section 311 of the Code of Civil Procedure to have the sale set aside. On the 12th of September 1903 this application was rejected, and on the 22nd of that month the sale was confirmed. It appears from the record that a sale certificate was granted to the appellant, who is now in possession. On the 6th of June 1906, nearly three years after the sale, the judgment-debtor applied to the Court to set aside the sale on the ground of its having been held in contravention of the provisions of section 99 of the Transfer of Property Act. The Court of first instance disallowed this application on the ground that it was too late. On appeal by the judgment-debtor the lower appellate Court reversed the decision of the Munsif and remanded the case to the Court of first instance under section 562 of the Code of Civil Procedure for decision on the merits. We may remark here that we see no reason whatever why the Court below should have sent back the case, as by its decision the only question between the parties had been determined. The appeal here has been very ably argued by the learned gentlemen who appear for the parties. They have cited a large number of authorities. It has been held by this Court in *Madho Prasad Singh* v. *Baijnath* (1) that, even though the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money decree, he is precluded by section 99 of the Transfer of Property Act from bringing that property to sale in execution of the simple money decree. Having regard to that ruling it must be held therefore that the Court was not justified in ordering the sale of the property. But the fact remains that it did order the property to be sold; that the sale took place and was confirmed, and that a certificate was granted to the auction purchaser, which, by the operation of section 316 of the Code of Civil Procedure, so far as the parties to the suit and the persons claiming through or under them, vests in the purchaser the title to the property sold. What

(1) Weekly Notes, 1905, p. 152.

we have to decide is whether the order for sale having been passed to the knowledge of the judgment-debtor, and having been allowed by him to become final, he can now at this late stage have the sale set aside and the purchaser divested of his title on the ground that the Court ought not to have ordered the property to be sold. In our opinion the decision of the Court of first instance on this question is right. In the case *Madan Makund Lal* v. *Jamna Kaulapuri* (1) the learned Judges remark in regard to a somewhat similar case :—" The plaintiff relied on the provisions of section 99 of the Transfer of Property Act. No doubt the sale was held in violation of the provisions of that section, but it was the duty of the judgment-debtors, whom the plaintiff now represents, to object to the sale or to the confirmation of the sale before the sale was confirmed. After the sale had been confirmed, as between the judgment-debtors and the auction-purchasers, the title of the latter has become complete and it is no longer open to the plaintiff, who stands in the shoes of the judgment-debtors, to question the title of the defendant on the ground that the sale at which they purchased was not authorized by law." It is true that that was a case of a suit, while this was an application under section 244 of the Code of Civil Procedure, but we do not think that this circumstance affects the principle laid down in the passage just cited. The decision in *Raj Kishore De Sarkar* v. *Dina Nath Chandra* (2) is also in favour of the appellant. In the case *Thaleri Pathumma* v. *Thandora Mammad* (3) it was held by Shephard and Benson, JJ., that, when an order for sale of a mortgaged property in execution of a money decree of the mortgagee was obtained after notice to the mortgagor and the property was sold in pursuance of such order, the mortgagor cannot go behind the order and seek to set aside the sale on the ground that it ought not to have been passed by reason of section 99 of the Transfer of Property Act. In the case of *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (4) a judgment-debtor whose occupancy holding had been sold in execution of a decree for rent objected to the application made by the auction purchaser after the confirmation of sale for delivery of possession

(1) Weekly Notes 1907, p. 48.
(2) (1908) 12 C. W. N., lx.
(3) (1899) 10 M. L. J., 110.
(4) (1899) I. L. R., 26 Calc., 727.

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on the ground that the sale was illegal. The learned Judges who decided that case, Ghose and Banerji, JJ., observe at page 732 of the judgment:—"An order for sale was made and in furtherance of that order the property was sold, whatever may be the effect of that sale. If the judgment-debtors were parties to that order, or were aware of it, and did not appeal against it, they are now precluded from questioning the propriety of that order and consequently of the sale that has taken place under that order." The decision by one of us in *Umed* v. *Jas Ram* (1) is also in favour of the appellant. In the case of *Sonu Singh* v. *Bihari Singh* (2) the learned Judges say:—"As regards the mortgagor raising no objection before the sale, it must be observed that no duty was imposed upon him to do so, it being the decree-holder alone who was responsible for the particulars to be entered in the sale proclamation." It appears that in that case the application to set aside the sale was made before confirmation, though this circumstance is not referred to in the judgment. The observation just cited is opposed to the authorities to which we have referred above, and with all deference to the learned Judges we are unable to accept the view expressed by them. We entirely disagree with the view expressed by the learned Additional Judge in this case that the respondent could not object until the sale had actually taken place. The learned Additional Judge is also wrong in saying that no specification of the property was given in the proclamation for sale. That document sufficiently defines the property which the decree-holder wished to sell, and if there was any irregularity in publishing the sale, that was a matter to be dealt with under section 311 of the Code of Civil Procedure. Following the authorities cited in the earlier part of this judgment, we are of opinion that this appeal must succeed. We set aside the order of the Court below and restore that of the Court of first instance. The appellant will have his costs here and in the lower appellate Court.

Appeal decreed.

(1) (1907) I. L. R., 29 All., 621. (2) (1905) I. L. R., 33 Calc., 283.

Before Mr. Justice Banerji and Mr. Justice Richards.

1908
February 3.

BAHADUR SINGH (OPPOSITE PARTY) *v.* NEGI PURAN SINGH, APPLICANT).*

Civil Procedure Code, sections 522, 525—*Private arbitration—Award made a rule of Court—Appeal.*

When an award made in a private arbitration has been made a rule of Court and a decree passed thereon, no appeal will lie except so far as the decree is in excess of or not in accordance with the award. In this respect there is no difference between a decree based upon a private award and a decree based upon an award made through the intervention of the Court. *Mustafa Khan* v. *Phulja Bibi* (1) distinguished.

THIS was an application under section 525 of the Code of Civil Procedure to have an award made a rule of Court. On the 25th of January 1904 the parties had referred the matters in dispute between them to arbitration without the intervention of a Court, and on the 20th of October 1904 the arbitrator made his award. The opposite party raised certain objections to the filing of the award, which were, however, overruled, and the Court (Subordinate Judge of Dehra Dun) ordered the award to be filed and passed a decree in accordance therewith. From this decree the opposite party appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondent.

BANERJI and RICHARDS, JJ.—This appeal arises out of a suit brought under the provisions of section 525 of the Code of Civil Procedure for the filing of an award made by an arbitrator appointed without the intervention of a Court. The parties referred their disputes to the arbitration of an arbitrator on the 25th of January 1904. The arbitrator made his award on the 20th of October 1904. Objections were raised on behalf of the appellant in regard to the award, which were overruled, and the Court ordered the award to be filed and made a decree in accordance with it. From this decree the present appeal has been preferred. A preliminary objection is taken on behalf of the respondent to the effect that no appeal lies. In our judgment this objection must prevail. Section 526 of the Code of Civil Procedure provides that if no ground such as is mentioned or referred to in section 520 or section 521 be shown against the award, the

* First Appeal No. 276 of 1905, from a decree of S. P. O'Donnell, Subordinate Judge of Dehra Dun, dated the 25th of July 1905.

(1) (1905) I. L. R., 27 All., 526.

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Court shall order it to be filed, and such award shall take effect as an award made under the provisions of Chapter XXXVII. As soon, therefore, as the Court orders an award to be filed the provisions of section 522 become applicable. One of those provisions is that on a judgment being given by the Court a decree shall follow, and no appeal shall lie from such a decree except in so far as the decree is in excess of or not in accordance with the award. It is admitted that the decree in the present case is not in excess of the award It is further admitted that if the decree in the present case had been a decree in a suit which the parties had referred to arbitration through the intervention of the Court no appeal would have lain. But it is contended that there is a difference between such a case and a case in which a reference is made without the intervention of a Court. We fail to see that any such distinction exists. As we have said above, according to the provisions of section 526 when a Court orders an award to be filed, section 522 must apply, that is to say, a decree must be made on judgment being pronounced by the Court; so that if this decree be not in excess of the award or does not vary the award no appeal would lie. We have been referred by the learned vakil for the appellant to the case of *Mustafa Khan* v. *Phulja Bibi* (1). In that case a Bench of this Court entertained an appeal under similar circumstances, but the question whether an appeal lay or not does not appear to have been raised, and it certainly was not decided. We are therefore unable to regard that case as an authority for the contention that in the case of a private arbitration when a decree is made by a Court in accordance with the award an appeal lies. We accordingly allow the objection, and holding that no appeal lies dismiss the appeal with costs. The objection preferred under section 561 of the Code of Civil Procedure necessarily fails. We dismiss it.

Appeal dismissed.

(1) (1905) I. L. R., 27 All., 526.

APPELLATE CIVIL.

1908
February 1.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

FAHMIDA KHANUM (DEFENDANT) *v.* JAFRI KHANUM (PLAINTIFF).*

Muhammadan law—Shias—Will—Power of devise amongst Shias.

Amongst Muhammadans of the Shia sect a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and such a legacy will be valid without the consent of the other heirs. Where, however, the legacy exceeds one-third of the estate it will not be valid to any extent unless the consent of the heirs, given after and not before the death of the testator, has been obtained. *Cherachom Vittil Ayisha Kutti Umah* v. *Valia Pudiakel Biathu Umah* (1), *Keramatulnissah Bibee* (2) and *Ranee Khujoorooniesa* v. *Roushun Jehan* (3) referred to.

THIS was a suit brought by one Jafri Khanum against her sister Fahmida Khanum for the partition of a house and certain movable property and for recovery of possession of a half share. In the plaint as originally filed the plaintiff alleged that the house had belonged to Husaini, the deceased father of the parties. The plaint was, however, amended, and it was then alleged that the property in suit belonged to Musammat Muhammadi Khanum, mother of the parties, who died on the 3rd October 1905, leaving her husband Husaini, one son, Kallu, and two daughters; that Kallu died on the 31st January and Husaini on the 7th February 1906; that the property therefore belonged in equal shares to the two daughters, but the defendant had taken exclusive possession thereof on the 25th February 1906. The defendant contended that the amendment of the plaint was improper; that the house had belonged to Husaini, husband of Musammat Muhammadi Khanum, and he had bequeathed the whole of it to the defendant by a will, dated the 2nd February 1906; that the defendant had expended Rs. 300 on Husaini's death ceremonies and that some of the ornaments claimed belonged to the defendant as her own property. The Court of first instance (Munsif of Cawnpore) gave the plaintiff a decree for part of her claim,

* Second Appeal No. 1186 of 1906, from a decree of Bepin Behari Mukerji, Judge of the Court of Small Causes, Cawnpore, exercising the powers of Subordinate Judge, dated the 17th of August 1906, modifying a decree of Raj Behari Lal, officiating Munsif of Cawnpore, dated the 6th of June 1906.

(1) (1865) 2 Mad., H. C. Rep., 350. (2) (1817) 2 Morley's Digest, 120. (3) (1876) L. R., 3 I. A., 291.

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FAHMIDA KHANUM v. JAFRI KHANUM.

including one-third of the house and ornaments. Both sides appealed, and these appeals were heard together. The lower appellate Court (Small Cause Court Judge) held that the will set up by the defendant was wholly invalid, and modified the Munsif's decree by giving a decree for one-half instead of one-third of the property in suit. The defendant appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellant.

Munshi *Haribans Sahai*, for the respondent.

STANLEY, C. J., and BURKITT, J.—We think that the decision of the lower appellate Court is correct. It appears to be well settled law that a Muhammadan testator, governed, as in this case, by the Shia School of law, cannot make a valid bequest of all his property to one of his heirs to the exclusion of the other heirs, without the consent of all the heirs obtained subsequent to his death. The legacy in this case included all the testator's property, both movable and immovable, and from the will it appears that he intended to exclude one of his daughters from participation in his estate. The Sunni School agree in holding that a bequest in favour of an heir is invalid, but according to the Shia law it would seem that a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one-third of his estate, and that such a legacy would be valid without the consent of the other heirs. Where, however, the legacy exceeds one-third of the estate, it will not be valid to any extent unless the consent of all the heirs, given after and not before the death of the testator, has been obtained. Mr. Baillie in his Digest of Muhammadan law, at p. 238, says:—If a person should make a will excluding some of his children from their shares in his succession the exclusion is not valid." Mr. Ameer Ali in his well known work, at p. 486 of the last edition, observes that "the author of the Sharaya has laid down that when a testator has excluded one of his children from succession and left the property wholly to others, his direction is entirely invalid and the inheritance will be apportioned among the heirs according to their legal share." Again, Sir Roland Wilson in his Digest of Anglo-Muhammadan Law, after stating the rule that a bequest to an heir (not exceeding the legal third) does not require the assent of the other heirs either before or after the death of

the testator to render it valid, observes:—"The Shia view is certainly the most easy to reconcile with the text of the Koran (II, 178), which recommends the believer to 'bequeath a legacy to his parents and kindred in reason,'" and than, referring to the existence of the difference between the two schools and the doubt which existed on the question, says:—"This, however, was just before the publication of Baillie's translation of the Sharaya, which places the matter beyond doubt." In the latest work on the subject, namely the Institutes of Musalman Law, by Nawab Abdur Rahman, some of the principal texts upon the subject and also authorities are quoted at page 276 and following pages. The learned author of that treatise observes, at p. 278:—"The alienation of one-third to a portion of the heirs will not be legal without the assent of the other heirs subsequently to the death of the testator, because their benefits, already sufficiently secured by the law, are not within the reason of the rule on which testamentary disposition is established, and such a bequest would, as the certain occasion of family dissension, be opposed to public policy." He refers to the case of *Cherachom Vitil Ayisha Kutti Umah* v. *Valia Pudiakel Biathu Umah* (1), in which the question is discussed. In another case to which he refers, namely, that of *Keramatulnissah Bibee* (2) it was held that if a man dispose of his property to his heirs and relations, to one more and to another less, or if he omit any of his relations and after his death the heirs and relations agree to the bequest, the will remains valid, otherwise the will only remains valid as to the bequest made to strangers and invalid for the heirs and blood relations who are to receive their respective shares according to Muhammadan law. See also *Ranee Khujooroonissa* v. *Roushun Jehan* (3). In view of the authorities we think that the decision arrived at by the Court below was correct and we dismiss the appeal with costs.

Appeal dismissed.

(1) (1865) 2 Mad., H. C. Rep., 350. (2) (1817) 2 Morley's Digest., 120.
(3) (1876) L R., 3 I. A., 291.

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February 7.

Before Mr. Justice Banerji and Mr. Justice Richards.

BABU SINGH AND ANOTHER (DEFENDANTS) *v.* BIHARI LAL (PLAINTIFF).*

Hindu law—Joint Hindu family—Liability of sons for father's debts—Defence that debts were incurred for immoral purposes—Burden of proof.

According to the Hindu law of the Mitakshara school it is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient, in order to establish the liability of a son to pay a personal debt of his father, if the debt be proved, and the son cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the son to discharge. *Maharaj Singh v. Balwant Singh* (1) distinguished. *Kishan Lal* v. *Garuruddhwaja Prasad Singh* (2) and *Karan Singh* v. *Bhup Singh* (3) followed. *Nanomi Babuasin* v. *Modhun Mohun* (4) referred to.

Where, in such a case as above, the son sets up the defence that the debt was incurred for immoral purposes, the burden of proof is on him and not on the creditor. *Debi Dat* v. *Jadu Rai* (5) followed. *Jamna* v. *Nain Sukh* (6) dissented from.

And merely general evidence of profligacy on the part of the father is not sufficient. *Chintamanrav Mahendale* v. *Kashinath* (7) referred to.

THIS was a suit brought by the mortgagee respondents to recover money due upon eight mortgage bonds by sale of the property hypothecated in each bond. There were two brothers, Rup Singh and Mahtab Singh, who formed members of a joint Hindu family. A portion of the family property was recorded in the name of their mother Indar Kunwar, and for this reason she joined her sons in executing some of the bonds. Of the eight bonds in suit two were executed by Mahtab Singh alone; two by Mahtab Singh and Indar Kunwar; one by Rup Singh and Mahtab Singh; another by Rup Singh and Indar Kunwar; another by Rup Singh, Mahtab Singh and Indar Kunwar, and one by Rup Singh and Indar Kunwar. Rup Singh and Mahtab Singh being dead the suit was brought against their sons, who disputed the claim mainly on the ground that the debts in respect of which the eight bonds were executed had been incurred by Rup Singh and Mahtab Singh for immoral purposes, and that the interests of the sons in

* First Appeal No. 283 of 1905 from a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 18th of August 1905.

(1) (1906) I. L. R., 28 All., 508.
(2) (1899) I. L. R., 21 All., 238.
(3) (1904) I. L. R., 27 All., 16.
(4) (1885) I. L. R., 13 Calc., 21.
(5) (1902) I. L. R., 24 All., 459.
(6) (1887) I. L. R., 9 All., 493.
(7) (1889) I. L. R., 14 Bom., 220.

the family property were not therefore liable. This plea was overruled by the Court of first instance (Subordinate Judge of Moradabad), which was of opinion that it had not been proved that the debts were tainted with immorality. That Court accordingly made a decree in favour of the plaintiff. The defendants appealed to the High Court.

Mr. *W. Wallach*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Dr. *Tej Bahadur Sapru*, for the respondents.

BANERJI and RICHARDS, JJ.—The suit which has given rise to this appeal was brought by the respondent to recover money due upon eight mortgage bonds by sale of the property hypothecated in each bond. There were two brothers, Rup Singh and Mahtab Singh, who formed members of a joint Hindu family. A portion of the family property was recorded in the name of their mother Indar Kunwar and for this reason she joined her sons in executing some of the bonds. Of the eight bonds in suit two were executed by Mahtab Singh alone; two by Mahtab Singh and Indar Kunwar; one by Rup Singh and Mahtab Singh; another by Rup Singh and Indar Kunwar; another by Rup Singh, Mahtab Singh, and Indar Kunwar, and one by Rup Singh and Indar Kunwar. Rup Singh and Mahtab Singh being dead, the suit was brought against their sons, who disputed the claim mainly on the ground that the debts in respect of which the eight bonds were executed had been incurred by Rup Singh and Mahtab Singh for immoral purposes, and that the interests of the sons in the family property were not therefore liable. This plea was overruled by the Court below, which was of opinion that it had not been proved that the debts were tainted with immorality. That Court accordingly made a decree in favour of the plaintiff. It is admitted that the decree as framed is not strictly accurate. It purports to direct the sale of all the property mortgaged in all the eight bonds for the total amount secured by those bonds, whereas the property mortgaged in each bond was liable only for the amount of that bond. This is what the plaintiff claimed in his plaint. The learned advocate for the respondent concedes that in this respect the decree of the Court below must be varied.

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The present appeal has been preferred by the sons of Rup Singh alone. The son of Mahtab Singh has submitted to the decree. It is contended on behalf of the appellants that it has been established that the debts in question were incurred for immoral purposes, except the amount of one bond, namely, that for Rs. 400, dated the 25th of March 1898. In regard to the amount of that bond it has been shown that it was borrowed for payment of Government revenue, which was actually paid, and Mr. *Wallach* fairly concedes that as regards this bond he can urge nothing on behalf of the appellants.

As for the last four bonds, which were executed by Mahtab Singh, and to two of which his mother Indar Kunwar was a party, the son of Mahtab Singh has taken no exception, but, as said above, the decree must be varied to this extent that it should direct that the amount of those bonds should be recovered by sale of the property hypothecated in each of them, so that when the decree is so varied the appellants will have no reason to complain.

There remain then the bond dated the 5th of June 1896 for Rs. 2,400, that dated the 22nd of April 1897 for Rs. 900 and that dated the 25th of April 1897 for Rs. 200. As to these the learned counsel for the appellants contends that it was for the plaintiff to establish that the debts were incurred for family necessities and that the plaintiff made such inquiries as would lead a reasonable man to believe that the money was required for purposes of the family or for payment of antecedent debts which it would be the pious duty of a Hindu son to discharge. For this contention he relies on a recent ruling of a Bench of this Court in *Maharaj Singh* v. *Balwant Singh* (1), and specially on the following passage in the judgment at page 541:—"We may say in passing that in a case in which a creditor is endeavouring to establish a claim under a simple hypothecation bond given by a Hindu father, having a limited interest only, against his sons, it appears to us to be not unreasonable to require proof on the part of the creditor that before he entered into the transaction he at least made such reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family." With regard to this

(1) (1906) I. L. R., 28 All., 508.

passage it appears to us, and as the head note of the report shows, that it was not necessary for the purposes of that case to decide the question whether the burden of proof lay on the creditor. Furthermore we find that Mr. Justice Burkitt in delivering judgment in the case of *Kishan Lal* v. *Garurud-dhwaja Prasad Singh* (1) was clearly of opinion that the onus did not lie on the creditor. At page 240 our learned brother observed:—"Had it been proved that the debt had been contracted for immoral purposes and that the person who advanced the money was aware of the purpose for which it was being borrowed the son would not have been liable. There is, however, not a scrap of evidence to show that the debt which formed the consideration for the bond in suit was contracted for any such purpose." In the Full Bench case of *Karan Singh* v. *Bhup Singh* (2) the learned Chief Justice in delivering the judgment of the Court stated the law on the subject to be as follows:—"It is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient, in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge." We think that this view is in consonance with the rulings of their Lordships of the Privy Council. We need only refer to the following observations of their Lordships in the well known case of *Nanomi Babuasin* v. *Modhun Mohun* (3):—"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or *against his creditor's remedies for their debts* if not tainted with immorality."

In our judgment the burden of proof lies on the son and not on the creditor, and we are of opinion, in concurrence with the decision in *Debi Dat* v. *Jadu Rai* (4), that the view taken in the case of *Jamna* v. *Nain Sukh* (5) can no longer be supported.

(1) (1899) I. L. R., 21 All., 238.
(2) (1904) I. L. R., 27 All., 16.
(3) (1885) I. L. R., 13 Calc., 21.
(4) (1902) I. L. R., 24 All., 459.
(5) (1887) I. L. R., 9 All., 493.

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We have carefully considered the evidence in this case. In our opinion it has not been established that the debts in question were incurred for immoral purposes. The bond dated 5th June 1896 for Rs. 2,400 recites that Rs. 2,002-2-0 out of that amount was left with the creditor for payment to one Mohan Lal. It has been fully proved that this payment was actually made, and was made in discharge of prior bonds in favour of Mohan Lal dating as far back as 1889. It was alleged that the debts in favour of Mohan Lal had also been incurred for the purposes of a prostitute in the keeping of Rup Singh. But we find from the evidence of the prostitute herself that she had no connection with Rup Singh when the early debts of Mohan Lal were incurred. We are therefore unable to accept the statements of the witnesses who have deposed that the debts in favour of Mohan Lal had been incurred for purposes of immorality. A prostitute named Nauratan was produced who deposed in regard to Rs. 400, the balance of the amount of the bond for Rs. 2,400, that it was paid over to her. The lower Court disbelieved this witness, and we see no reason to come to a different conclusion as to her credibility. Her statements are too vague to be accepted. On the contrary, Hari Lal, a witness for the plaintiff, proved that this sum of Rs. 400 was appropriated towards family expenses.

As to the bonds for Rs. 900 and Rs. 200, dated respectively 22nd April 1897 and 25th April 1897, they appear to represent one transaction, as both of them were registered on the same date, that is, on the 3rd of May 1897. Nauratan says that Rs. 750 out of the amount of these bonds was paid to her for the expenses of the tonsure ceremony of her son by Rup Singh. She says that this money was paid to her by the plaintiff at the house of Rup Singh at Kanderki. It appears, however, from the endorsement of the Sub-Registrar made on the bonds that at the time of registration Rs. 764 and odd was paid in cash at Moradabad in the office of the Sub-Registrar. The statement of the witness therefore that it was paid to her at Rup Singh's house by the plaintiff is clearly untrue. We have on the other hand evidence to show that the marriage of the daughter of Rup Singh was celebrated about that time, and that the year 1897 being a year of scarcity and famine there was greater necessity for borrowing money

in that year than in other years. The learned Subordinate Judge did not believe the witnesses adduced to prove that all these debts had been incurred for purposes of immorality. He says that they impressed him as being tutored witnesses and partisans of the defendant's friends. We have not the advantage which the learned Subordinate Judge had of hearing the witnesses and seeing their demeanour, and nothing has been shown to us to justify our differing from the conclusion at which he arrived as to the credibility of these witnesses. It is true that there is some general evidence that Rup Singh, and possibly Matab Singh, were profligates. But even if this evidence be believed it is not sufficient, as observed in the case of *Kishan Lal* v. *Garuruddhwaja Prasad* (1) and in *Chintamanrav Mahendale* v. *Kashinath* (2) to exonerate the sons of the debtors from their pious duty to pay their father's debts.

For these reasons we are of opinion that the appeal has no force. As we have said in an earlier part of this judgment, the decree of the Court below is not strictly correct and is not in conformity with the prayer contained in the plaint. We therefore vary the decree so far that we direct that the amount of each bond together with costs proportionate to that amount and interest thereon up to the date fixed for payment be realised by sale of the property hypothecated in the bond relating to that amount, and we order that these amounts be calculated and specified in our decree. We extend the time for payment of the decretal amount to the 1st of August 1908. As the rate of interest in some of the bonds was very high, we direct that no further interest shall be charged after the date fixed for payment mentioned above. The respondent will get one half of his costs of this appeal. In other respects we affirm the decree of the Court below.

Decree modified.

(1) (1899) I. L. R., 21 All., 238 at p. 240. (2) (1889) I. L. R., 14 Bom., 320.

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February 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

NARPAT AND ANOTHER (DEFENDANTS) *v.* RAM SARAN DAS (PLAINTIFF).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 68 *(c)—Mortgage—Construction of document—Power of sale in a usufructuary mortgage.*

A mortgage-deed which was primarily usufructuary provided that if the mortgagor failed to deliver possession or if the mortgagee was dispossessed from the mortgaged premises he might recover the amount of the mortgage debt from the mortgagor and the mortgaged property. *Held* that the mortgagee failing to get possession was competent to sue for and obtain a decree for sale of the mortgaged property. *Jafar Husen* v. *Ranjit Singh* (1) and *Kashi Ram* v. *Sardar Singh* (2) referred to.

THIS was a suit for sale on a mortgage. The mortgage was primarily a usufructuary mortgage, but contained a provision that if, *inter alia,* the mortgagor did not give possession of the mortgaged property, the mortgagee could recover the mortgage money with interest at Rs. 2 per cent. per mensem from the mortgagor *and the mortgaged property.* The Court of first instance (First Additional Munsif of Meerut) dismissed the suit, finding that the plaintiff was in possession of the mortgaged property. But on appeal by the plaintiff the Additional District Judge found that the plaintiff was not in possession, and allowing the appeal, gave him a decree for sale. The defendants appealed to the High Court.

Munshi *Gulzari Lal,* for the appellants.

The Hon'ble Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram Dave),* for the respondent.

STANLEY, C. J., and BURKITT, J.—We are of opinion that the learned District Judge rightly decided the appeal before him. From a perusal of the mortgage which has given rise to this suit it appears to us that the only reasonable inference to be drawn from it is that the intention of the parties was to provide for the realization of the mortgage debt from the property itself and not merely from its usufruct. The deed in fact was of the nature of a simple mortgage, as well as of a usufructuary mortgage. The case

* Second Appeal No. 4 of 1907 from a decree of Ahmad Ali Khan, Additional Judge of Meerut, dated the 21st of November 1906, reversing a decree of Ram Chandra Chaudhri, Munsif of Meerut, dated the 18th of December 1905.

(1) (1898) I. L. R., 21 All., 4. (2) (1905) I. L. R., 28 All., 157.

in fact resembles more that of *Jafar Husen* v. *Ranjit Singh* (1) than that of *Kashi Ram* v. *Sardar Singh* (2). In the first mentioned of these cases the Court came to the conclusion that the intention of the parties was that the debt was realizable by sale of the mortgaged property, whereas in the other case, this Bench was of opinion that the mortgage in suit was merely a usufructuary mortgage. For these reasons we dismiss the appeal with costs.

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NARPAT v. RAM SARAN DAS.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1908 *February 7.*

TIKAM SINGH AND ANOTHER (DEFENDANTS) *v.* KHUBI RAM AND ANOTHER (PLAINTIFFS).*

Lambardar and co-sharer—Powers of lambardar to deal with coparcenary lands—Lease for seven years.

In the absence of a custom to the contrary a lambardar has no power, without the consent of the co-sharers, to grant a lease of coparcenary land beyond such term as the circumstances of the particular year or season may require. *Chattray* v. *Nawala* (3) followed. *Mukhta Prasad* v. *Kamta Singh*, (4) distinguished.

THIS was a suit brought by certain co-sharers in the village for a declaration that a lease executed by defendant No. 4, the lambardar, of 160 bighas odd, cultivatory holding, in the village of Edalpur for a term of seven years was void as against them, on the allegation that the lambardar had acted in excess of his powers in granting the lease, and had done so at an inadequate rental in order to injure the plaintiffs. The Court of first instance (Munsif of Havali, Aligarh) decreed the plaintiffs' claim. The lessees appealed. The lower appellate Court (Additional District Judge of Aligarh) found that the rental was inadequate and the term too long, and accordingly dismissed the appeal and confirmed the Munsif's decree. The defendants lessees thereupon appealed to the High Court.

Babu *Parbati Charan Chatterji*, for the appellants.

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* Second appeal No. 151 of 1907 from a decree of Khetter Mohan Ghosh, second Additional Judge of Aligarh, dated the 8th of November 1906, confirming a decree of Banke Behari Lal, Munsif of Havali, dated the 25th of June 1906.

(1) (1898) I. L. R., 21 All., 4.
(2) (1905) I. L. R., 28 All., 157.
(3) (1906) I. L. R., 29 All., 20.
(4) Weekly Notes, 1906, p. 277.

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Munshi *Gobind Prasad* and Munshi *Gulzari Lal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The suit out of which this appeal has arisen was brought by the plaintiffs, who are two of the co-sharers of a village, to have a lease executed by the lambardar of the village in favour of the defendants set aside. The defendants are also co-sharers of this village. The lambardar and the other co-sharers were all made parties to the suit. The lease was for a term of seven years, and it is alleged and has been proved that it was made at an inadequate rent.

The Court below set it aside on, amongst other grounds, the ground that a lease by a lambardar for a term of seven years under ordinary circumstances could not be supported. This is a rule which has been acted upon by this Court for a number of years, and was followed by a Bench of this Court in the case of *Chattray* v. *Nawala* (1). In that case a Bench, of which one of us was a member, held that it was reasonable that a manager should have power to make temporary lettings, but the duties imposed upon him did not seem to admit of his executing in favour of a lessee without the consent of the coparcenary body a lease for a long term of years, and then we pointed out that there was nothing to show that the exigencies of the season or time when the impeached lease was granted required that the grant should be made for so long a term as seven years. This decision followed previous rulings and is in no way inconsistent with the case of *Mukta Prasad* v. *Kamta Singh* (2). In that case it was held that a lambardar was competent to execute a lease of land for ten years without reference to other co-sharers where the land could not otherwise be let and where it was for the benefit of the co-sharers that the land should be so let. In his judgment in that case Sir Arthur Strachey, C.J., observed as follows:—"It appears that this land is of inferior quality and it contained no pacca well for the purposes of irrigation. Upon the facts found by the Court below it appears that if the lambardar had not executed this lease for ten years, the land would not have been cultivated at all and would have yielded no profit to the coparceners." It will therefore be observed that the

(1) (1906) I. L. R., 29 All., 20. (2) Weekly Notes, 1906, p. 277.

circumstances of that case were exceptional. The rule appears to be, as we have stated, that a lambardar cannot of himself execute a lease of land beyond such term as the circumstances of the particular year or season may require. We therefore dismiss the appeal with costs.

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TIKAM SINGH v. KHUBI RAM.

Appeal dismissed.

Before Mr Justice Sir George Knox and Mr. Justice Aikman.

1908 *February 7.*

SUNDAR DEO (PLAINTIFF) *v.* BHAGWAN DAS AND OTHERS (DEFENDANTS).*

Act No. IX of 1872 *(Indian Contract Act), section* 178 *– Pawnor and pawnee— Pawnor not owner but having a right to possession—Suit by owner for declaration of his title.*

A person who had obtained possession of certain movable property belonging to a minor in the capacity of a trustee, and who had been allowed to retain possession of such property after the minor came of age, pawned some of it to persons who were found to have acted, negligently perhaps, but honestly and in good faith. *Held* that the pledge was valid, but the owner was entitled to a declaration of his right to redeem the articles so pawned.

THIS was a suit brought for a declaration of the plaintiff's right to redeem certain property, which had been pawned under the following circumstances. According to the plaint his grandfather left the plaintiff at the time of his death a minor and not fit to manage his affairs, and therefore he appointed Babu Kishan Dat an agent and made over all the jewelry and property to him in trust for the plaintiff. The plaintiff attained majority, but allowed the defendant to continue in possession of the aforesaid property on his behalf. He subsequently found out that a considerable portion of the property had been pawned by Kishan Dat through Lachmi Nandan, another of the respondents and brother-in-law of Kishan Dat, to the other three respondents. Kishan Dat and Lachhmi Nandan were prosecuted and convicted of embezzlement with regard to the said property. The ornaments were during the criminal trial deposited in the Criminal Court. This suit was brought under the direction of that Court to declare the plaintiff's right to possession of them. The Court of first instance (Subordinate Judge of Agra gave the plaintiff a declaration that the plaintiff was entitled to redeem

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* Second Appeal No. 993 of 1905 from a decree of A. B. Bruce, District Judge of Agra, dated the 28th of September 1905, confirming a decree of Shankar Lal, Subordinate Judge of Agra, dated the 20th of April 1905.

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the ornaments in dispute, with one exception, upon payment of the money which might be still due in respect of the ornaments pawned by Kishan Dat through Lachhmi Nandan, and that Kishan Dat and Lachhmi-Nandan were liable to the plaintiff for such amount as he might pay. On appeal the District Judge confirmed the decree of the first Court. The plaintiff appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave* for the appellant.

Pandit *Moti Lal Nehru* and Lala *Kedar Nath*, for the respondents.

KNOX and AIKMAN, JJ.—The appellant in this second appeal was plaintiff in the Court of first instance. According to the plaint his grandfather left the plaintiff at the time of his death a minor and not fit to manage his affairs, and therefore he appointed Babu Kishan Dat an agent and made over all the jewelry and property to him in trust for the plaintiff. The plaintiff attained majority, but allowed the defendant to continue in possession of the aforsaid property on his behalf. He subsequently found out that a considerable portion of the property had been pawned by Kishan Dat through Lachhmi Nandan, another of the respondents and brother-in-law of Kishan Dat, to the other three respondents. Kishan Dat and Lachhmi Nandan have been prosecuted and convicted of embezzlement with regard to the said property. The ornaments had during the criminal trial been deposited in the Criminal Court. This suit was brought under the direction of that Court to declare the plaintiff's right to possession of them. The Court of first instance gave the plaintiff a declaration that the plaintiff was entitled to redeem the ornaments in dispute, with one exception, upon payment of the money which might be still due in respect of the ornaments pawned by Kishan Dat through Lachhmi Nandan, and that Kishan Dat and Lachhmi Nandan were liable to the plaintiff for such amount as he might pay. On appeal the learned District Judge confirmed the decree of the first Court. He found that Kishan Dat's possession over the property was not acquired by any offence or fraud and that the pawnees acted in good faith. He applied the law as contained in section 178 of

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Act No. IX of 1872. The plaintiff comes here in second appeal and contends that Kishan Dat was not in possession of the jewelry pawned within the meaning of section 178 of Act No. IX of 1872 and that neither Kishan Dat nor Lachhmi Nandan had any authority to pawn the jewelry. The case has been very ably argued by the learned advocate for the appellant and our attention has been called to several rulings. None of these is exactly on all fours with the circumstances of the present case, and there is no ruling that we can find by this Court. The section is undoubtedly a difficult one to construe, especially when taken in connection with the language of section 179 of the same Act. Having regard to the findings by the lower appellate Court we think that the case does fall within the provisions of section 178 and that the pawnees are protected by the provisions of that section. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1908 *February* 8.

JANKI PRASAD SINGH (PLAINTIFF) *v.* BALDEO PRASAD AND OTHERS (DEFENDANTS).*

Act No. IX of 1872 *(Indian Contract Act), sections* 69 *and* 70—*"Person interested in the payment of money"—Volunteer—Civil Procedure Code, section* 283.

The plaintiffs, alleging themselves to be the purchasers of the mortgagees' rights in certain land, paid the amount of a decree against the mortgagee in order to save the property from sale. But it had been already found in a suit under section 283 of the Code of Civil Procedure, that the sale to the plaintiffs was fictitious and inoperative. *Held* that the plaintiffs were not entitled to recover the amount paid as above described from their vendors. *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (1) and *Chedi Lal* v. *Bhagwan Das* (2), referred to.

THE defendants in this case executed a sale deed purporting to convey to the plaintiffs their mortgagee rights in certain lands in mauza Khampar. One Bhikari Teli in execution of a money decree against the defendants attached their mortgagee interest. The plaintiffs objected in the execution department, but their

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* Second Appeal No. 1118 of 1906, from a decree of R. L. H. Clarke, District Judge of Gorakhpur, dated the 30th of August 1906, confirming a decree of Ladli Prasad, Munsif of Deoria, dated the 25th of June 1906.

(1) (1875) L. R., 2 I. A., 131. (2) (1888) I. L. R., 11 All., 234.

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objection was disallowed. They then filed a suit under section 283 of the Code of Civil Procedure, but that suit was decided against them on the finding that the sale under which they claimed was purely fictitious, and that decree became final. Notwithstanding this, the plaintiffs paid up the amount of Bhikari Teli's decree, and then brought the present suit against their vendors to recover the sum so paid. The Court of first instance (Munsif of Deoria) dismissed the suit, and this decree was in appeal affirmed by the District Judge. The plaintiff appealed to the High Court.

Mr. *W. Wallach* and Munshi *Gulzari Lal*, for the appellant.

Mr. *M. L. Agarwala* and Munshi *Govind Prasad*, for the respondent.

STANLEY, C.J., and BURKITT, J.—We think that the decision of the Courts below is correct. The plaintiff appellant has been able to establish no such relationship existing between him and the defendants as would justify the payment of the money which he now seeks to recover. It has been found by the Courts below that the assignment made to him of the mortgagee rights of the defendants was fictitious and collusive, and consequently the judgment creditors of the assignors had a right to sell those mortgagee rights in execution of their decree. We do not think that section 69 or section 70 of the Contract Act helps the appellants. As regards section 69, a party who makes a payment on behalf of another, before he can recover the amount so paid, must show that he had an interest in making the payment. Their Lordships of the Privy Council in dealing with the rights of parties making payments observed, in the case of *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (1) :—"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair and proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt." Now in this case, in view of the facts which have been found by the Courts below, we cannot

(1) (1875) L. R., 2 I. A., 131.

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discover that there was any obligation, either express or implied on the part of the appellant to pay the debt of the respondents. The case therefore does not fall within the purview of section 69 of the Contract Act. Nor does it fall within section 70. In the case of *Chedi Lal* v. *Bhagwan Das* (1), it was held by a Bench of this Court that by the use of the word "lawfully" in section 70 of the Contract Act, the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create, or such as would justify, the inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. In his judgment Straight, J., observed: —"If the plaintiffs as mere volunteers chose to put their hands into their pockets and to pay a sum of money, not for the defendants but for themselves, that was their own look-out, and they cannot now claim the benefit of section 70." We think upon the facts, therefore, that the payment made by the appellant was a purely voluntary payment, and possibly was made, as is suggested by the Courts below, with some sinister object. We dismiss the appeal with costs.

Appeal dismissed.

1908 *February* 11.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

LACHMAN DAS (PLAINTIFF) *v.* ABPARKASH (DEFENDANT) *

Civil Procedure Code, section 508—Arbitration—Order of reference not fixing a period within which the award is to be made—Appeal.

Where an order of reference to arbitration made by a Court omits to fix a date for the delivery of the award, such omission is not a mere irregularity, but is a defect fatal to the order and to all subsequent proceedings founded thereon. *Chuha Mal* v. *Hari Ram* (2) followed. *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (3) referred to.

IN this case after evidence had been given in a suit between the parties to this appeal and some of the issues in the case had been determined by the Court, and there remained two issues only for determination, by consent of the parties the matters in

* First Appeal No. 30 of 1906 from a decree of Chajju Mal, Subordinate Judge of Aligarh, dated the 26th of September 1905.

(1) (1888) I. L. R., 11 All., 234. (2) (1886) I. L. R., 8 All., 543. (3) (1891) L. R., 18 I. A. 55.

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difference were left to the arbitration of two gentlemen who happened to be present in Court. The Court there and then passed an order referring the matter to arbitration, but did not, as is required by section 508 of the Code of Civil Procedure, fix a time for the delivery of the award or name the arbitrators. The arbitrators forthwith proceeded in Court, without the examination of the parties, to draw up an award, and upon the reward so drawn up, which does not deal specifically with the two issues which remained undetermined, a decree was passed. The present appeal was preferred from the decree so passed by the plaintiff in the suit.

Mr. *B. E. O'Conor*, Babu *Durga Charan Banerji* and Munshi *Gulzari Lal*, for the appellant.

Pandit *Moti Lal Nehru* and Pandit *Mohan Lal Nehru*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The decree in this case in respect of which the appeal before us has been preferred was passed upon a so-called award. After evidence had been given and some of the issues in the case had been determined by the Court, and there remained two issues only for determination, by consent of the parties the matters in difference were left to the arbitration of two gentlemen who happened to be present in Court. The Court there and then passed an order referring the matter to arbitration, but did not, as is required by section 508, fix a time for the delivery of the award or name the arbitrators. The arbitrators forthwith proceeded in Court, without the examination of the parties, to draw up an award, and upon the award so drawn up, which does not deal specifically with the two issues which remained undetermined, a decree was passed. The main objection to the decree which was so passed is that the whole proceedings were irregular owing to the fact that the provisions of section 508 were not complied with. Other objections were also raised, with which we think it unnecessary to deal. If the only objection were in respect of the omission to fix a date for the delivery of the award, we should have been disposed to regard that as an irregularity which would be cured by the acquiescence of the parties in the preparation of the award by the arbitrators, were it not for the clear and explicit language of

their Lordships of the Privy Council. Indeed in this Court there is a decision of a Bench that the omission in the order of the Court to fix a time for the delivery of the award would invalidate the award. This was the case of *Chuha Mal* v. *Hari Ram* (1). In that case Oldfield and Brodhurst, JJ., held that the law requires that there shall be an express order of the Court fixing the time for the delivery of the award, for extending or enlarging such time, and that an award which is invalid under section 521 of the Code of Civil Procedure, because not made within the period allowed by the Court, is not an award upon which the Court can pass a decree, and a decree passed in accordance with such an award is not a decree in accordance with an award from which no appeal lies. The Privy Council pronouncement to which we have referred was made in the case of *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (2). Lord Morris, delivering the judgment of the Board, observes :—"Their Lordships are of opinion that section 508 is not merely directory, but that it is mandatory and imperative. Section 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to their Lordships that this section would be rendered inoperative if section 508 is to be merely treated as directory." In view of the statement of the law by their Lordships we cannot but regard the proceedings taken in this suit as being obnoxious to the mandatory provisions of section 508, and accordingly we must allow the appeal. Allowing the appeal, we set aside the decree of the Court below and remand the suit to that Court under section 562 of the Code of Civil Procedure with directions that it be reinstated in its original number in the file of pending suits and be disposed of according to law. Costs here and hitherto will abide the event. Objections have been filed by the plaintiff appellant under section 561 of the Code. These objections fall to the ground in consequence of our decision on the appeal. We dismiss them, but without costs.

Appeal decreed and cause remanded.

(1) (1886) I. L. R., 8 All., 548. (2) (1891) L. R., 18 I. A.,

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February 17.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir William Burkitt, and Mr. Justice Aikman.

MUNIR-UN-NISSA AND OTHERS (DEFENDANTS) *v.* AKBAR KHAN (PLAINTIFF).*

Act No. XV of 1877 *(Indian Limitation Act), schedule II, Articles* 111 *and* 132—*Limitation—Act No. IV of* 1882 *(Transfer of Property Act), section* 55 (4) (*b*)—*Suit by vendor to enforce charge for unpaid balance of purchase money.*

Held that a suit for the enforcement of the payment of purchase money by sale of the purchased property is a suit to enforce a statutory charge differing from the lien which an unpaid vendor in equity possessed for the recovery of the balance of his purchase money and that the article of the Limitation Act applicable is article 132 and not article 111. *Webb* v. *Macpherson* (1), *Har Lal* v. *Muhamdi* (2) and *Ramakrishna Ayyar* v. *Subrahmania Ayyen* (3) followed. *Baldeo Prasad* v. *Jit Singh* (4) overruled.

THE plaintiff in this case, one Akbar Khan a Tahsil chaprasi, purchased certain property at auction for Rs. 25. Finding some difficulty in getting possession of the property, the purchaser consulted a pleader of the name of Nazir Husain, and the result of their consultation was that the property was sold to the pleader's wife Musammat Munir-un-nissa, for the sum of Rs. 4,000. This sale took place on the 31st of August 1892. On the 29th of August 1904, Akbar Khan instituted the present suit, admitting the receipt of Rs. 400 out of the consideration money, and asking for a decree for Rs. 3,600. The Court of first instance (Subordinate Judge of Saharanpur) gave the plaintiff a decree for Rs. 3,600. The defendants appealed. The lower appellate Court (District Judge of Saharanpur) with some modifications affirmed the decree of the Court of first instance and dismissed the appeal. The defendants appealed to the High Court. On the question whether or not the plaintiff's suit was barred by limitation the appeal was referred by order of the Chief Justice, dated the 3rd of January 1908, to a bench of three Judges.

* Second Appeal No. 990 of 1906 from a decree of L. M. Stubbs, District Judge of Saharanpur, dated the 24th of July 1906, modifying a decree of Nihal Chandra, Subordinate Judge of Saharanpur, dated the 28th of March 1906.

(1) (1903) I. L. R., 31 Calc., 57.
(2) (1899) I. L. R., 21 All., 454.
(3) (1905) I. L. R., 29 Mad., 305.
(4) Weekly Notes, 1891, p. 130.

Mr. *B. E. O'Conor*, Mr. *Muhammad Ishaq Khan* and Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *A. E. Ryves*, Mr. *Abdul Raoof* and Dr. *Tej Bahadur Sapru* for the respondent.

STANLEY, C.J., and BURKITT and AIKMAN, JJ.—This appeal arises out of a suit brought by a vendor to enforce payment of the balance of his purchase money by sale of the purchased property. The main question raised in the appeal is whether article 111 of schedule II to the Limitation Act, or article 132 is applicable to the case. Article 111 provides for a suit brought by a vendor of immovable property to enforce his lien for unpaid purchase money and the period given for the institution of a suit under that article is three years. Article 132 provides for a suit to enforce payment of money charged upon immovable property, the period allowed for the institution of such a suit being 12 years. It is admitted that if article 111 is applicable to this case the suit is barred, but if article 132 applies the suit has been brought within time.

The respondent's case is that the suit is not a suit to enforce a lien within the meaning of article 111, but is a suit to enforce a statutory charge created by section 55 of the Transfer of Property Act. The Courts in this country have taken varying views upon this question, the Bombay High Court holding that article 132 was the article applicable to a case of the kind, whilst, until quite recently, the Madras High Court held that the article applicable was article 111. In this High Court there were also conflicting decisions. In the case of *Baldeo Prasad* v. *Jit Singh* (1), Edge, C.J., and Tyrrell, J., held that article 111 was applicable. But in a later case we find a carefully considered judgment delivered by the late Sir Arthur Strachey, the Court consisting of himself and Banerji, J., ruling that article 132 applied. This was the case of *Har Lal* v. *Muhamdi* (2). In a recent case in the Madras High Court—*Ramakrishna Ayyar* v. *Subrahmania Ayyen* (3)—the question was again considered, and in view of a statement of the law by their Lordships of the Privy Council in a recent case, to which we shall presently

(1) Weekly Notes, 1891, p. 130. (2) (1899) I. L. R., 21 All., 454.
(3) (1905) I. L. R., 29 Mad., 305.

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refer, the Court held, overruling the previous decisions, that article 132 was the article applicable to a suit of the kind. The case to which the learned Judges in that case referred is the case of *Webb* v. *Macpherson* (1). In that case their Lordships, at pp. 71 and 72, referred to section 55 of the Transfer of Property Act, which provides that "in the absence of a contract to the contrary * * * the seller is entitled, where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid and for interest on such amount or part." A number of English authorities were cited to their Lordships in that case, and dealing with these authorities they observed, at page 72:—"No doubt English cases might be useful for the purpose of illustration, but it must be pointed out that the charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by the Courts of Equity to an unpaid vendor. That lien was a creation of the Court of Equity and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge. The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that distinction was understood when equity was administered by the Court of Chancery in England, and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor, unless it be excluded by contract. Such a charge therefore stands in quite a different position from a vendor's lien." In view of this language of their Lordships it appears to us that we must take it as settled that a claim such as that referred to in the present case for the enforcement of the payment of purchase money by sale of the purchased property is a statutory charge differing from the lien which an unpaid vendor in equity possessed for the recovery of the balance of his purchase money and that therefore the article of the Limitation Act applicable to this suit is article 132.

A minor question which has been raised in the appeal is that, the suit having been dismissed as regards one of the defendants

(1) (1903) I. L. R., 31 Calc., 57.

Nazir Husain, he should have been exempted from the payment of costs. In view, however, of the relationship of Nazir Husain to the vendee, this is not a case in which we should interfere with the decision of the Court below on the question of costs.

The only other remaining question which has been brought to our notice is the following, namely, it is alleged by the vendee that she paid in respect of prior incumbrances upon the purchased property a considerable sum of money, exceeding, we are told, the balance of the purchase money due by her, and she claims a right to set off the money so paid against a like amount of the purchase money. The deed of purchase has been translated for us, and so far as we can gather there is no provision in it that the vendee should be liable to pay off subsisting charges. On the contrary, the property appears to have been sold free from incumbrances; certainly there is no mention of any existing incumbrances. One of the duties of a vendor, as prescribed by section 55 of the Transfer of Property Act, is to discharge, amongst other things, all incumbrances on the property existing at the date of the sale except where the property is sold subject to incumbrances. It therefore appears to us that the vendee is entitled, if she paid any prior incumbrance which the vendor was liable to pay, to set off the amount so paid against a proportionate part of the balance remaining unpaid of the purchase money or against the entire balance if the amount so paid was equal to or exceeded the balance. Whether or not any money has been paid in respect of prior incumbrances by the vendee has not been ascertained. The learned District Judge says in the course of his judgment that "if it be found that the defendant appellant is entitled to a set-off on this head, it will be necessary to have this point determined, as the lower Court has recorded no finding upon it." In the view which the learned District Judge took he did not go into this question. We think he ought to have done so, and before we finally determine this appeal we must refer an issue under the provisions of section 566 of the Code of Civil Procedure for determination by him. The issue will be:—

Whether or not at the date of the sale to the vendee appellant, any incumbrances on the purchased property were outstanding, and if so, whether the defendant vendee

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has paid any, and if so, what amount in discharge of those incumbrances?

We accordingly refer this issue to the lower appellate Court, and we shall ask that Court to determine it with the utmost expedition. The Court will take such relevant evidence as the parties may tender. On return of the finding seven days will be allowed for filing objections. We shall reserve the question of costs for the final hearing.

[On this issue it was found that Munir-un-nissa had paid somewhat more than the amount of the unpaid purchase money. The appeal was accordingly decreed, and the plaintiff's suit dismissed with costs on the 7th of April, 1908.]

Appeal decreed.

APPELLATE CIVIL.

1908 *February* 18.

Before Mr. Justice Banerji and Mr Justice Richards.

NITA RAM (OBJECTOR) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY).*

Act No. I of 1894 *(Land Acquisition Act), section* 49 *—"House, manufactory or building"—Acquisition of part only required—Whether whole must be purchased.*

Land which is not a house, manufactory or building in the literal sense, and which is not reasonably required for the full and unimpaired use of a house, manufactory or building cannot be considered as part of the "house, manufactory or building" within the meaning of section 49 of Act No. I of 1894. Whether or not the land is so reasonably required is a question of fact depending upon the particular circumstances of each case. *Khairati Lal* v. *The Secretary of State for India in Council* (1) distinguished.

THE facts of this case are as follows:—

The Government were acquiring, under the powers conferred by the Land Acquisition Act, 1894, a small piece of land at the end of a garden occupied by one Nita Ram. The piece of land was situate at one corner at the extreme end of the garden which was used in connection with a house. Nita Ram objected that, inasmuch as the piece of land was part of the garden, it was a part of the house within the meaning of section 49 of the Land Acquisition Act and that he was entitled to insist that the

* First Appeal No. 43 of 1906 from a decree of L. G. Evans, District Judge of Saharanpur, dated the 18th of December 1905.

(1) (1889) I. L. R., 11 All., 378.

Government should take the whole house and garden, and not merely the particular bit of the garden which was necessary for the special purpose for which the land was being acquired. No evidence was offered by either side, but the District Judge went and inspected the locality himself. He came to the conclusion that the particular piece of land was not reasonably required for the full and unimpaired use of the house occupied by Nita Ram, and in this view he decided that the Government was not bound to take over the entire house and garden. From this decision Nita Ram appealed to the High Court.

The Hon'ble Pandit *Sundar Lal*, for the appellant.

Mr. *A. E. Ryves*, for the respondent.

BANERJI and RICHARDS, JJ.—This is an appeal from a decree of the District Judge of Saharanpur upon a reference to him under section 49 of the Land Acquisition Act. The Government were acquiring, under the powers conferred by the Act, a small piece of land at the end of a garden occupied by Nita Ram. We expressly refrain from any expression of opinion as to the nature of Nita Ram's occupancy. That question is not before us. The piece of land is situate at one corner at the extreme end of the garden which is used in connection with the house. The appellant contends here, as he clearly contended before the District Judge, that, inasmuch as the piece of land was part of the garden, it was a part of the house within the meaning of section 49 of the Land Acquisition Act and that the owner of the property was entitled to insist that the Government should take the whole house and garden, not merely the particular bit of the garden which was necessary for the special purpose for which the land was being acquired. No evidence was offered by either side, but the learned District Judge went and inspected the locality himself. He clearly came to the conclusion that the particular piece of land was not reasonably required for the full and unimpaired use of the house occupied by Nita Ram, and in this view he decided that the Government was not bound to take over the entire house and garden. In our opinion, once he came to the conclusion that the plot to be acquired was not reasonably required for the full and unimpaired use of the house, his decision was perfectly correct. A case has been cited to us in support of the

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contention of the appellant that the entire house and garden should be taken. That is the case of *Khairati Lal* v. *The Secretary of State for India* (1). In that case, the facts of which differed considerably from the facts of the present case, a Bench of this Court held that where the Government were compulsorily acquiring certain out-offices in a compound, the owner could insist upon their taking the whole. That case, however, was decided under Act No. X of 1879, section 55. Section 55 of that Act is exactly the same as the first part of the first sub-section of section 49 of Act No. I of 1894. But sub-section I of section 49 of Act No. I of 1894 contains the following additional provision :—" Provided also that if any question shall arise as to whether any land proposed to be taken under this Act does or not form part of a house, manufactory or building within the meaning of this section, the Collector shall refer the determination of such question to the Court and shall not take possession of such land until after the question has been determined. In deciding on such a reference the Court shall have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house, manufactory or building."

In our judgment land which is not a house, manufactory or building in the literal sense and which is not reasonably required for the full and unimpaired use of a house, manufactory or building cannot be considered as part of the " house, manufactory or building " within the meaning of section 49 of Act No. I of 1894. Whether or not the land is so reasonably required is a question of fact depending upon the particular circumstances of each case. In our judgment the appeal should be dismissed and we accordingly dismiss it with costs. We direct that these costs should include Rs. 100, which we hereby fix as the fee of the respondent's counsel.

Appeal dismissed.

(1) (1889) I. L. R., 11 All., 378.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

1908
February 25.

SHEO PRASAD AND ANOTHER (DECREE-HOLDERS) *v.* INDAR BAHADUR SINGH AND OTHERS (JUDGMENT-DEBTORS).*

Execution of decree—Limitation—Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 179 (4)—*Application to take some step in aid of execution—Payment of process fees.*

Held that the mere payment of process fees on an application for execution, unaccompanied by any application asking the Court to take some specific action, will not have the effect of giving a fresh starting-point for limitation within the meaning of article 179 (4) of the second schedule to the Indian Limitation Act, 1877. *Thakur Ram* v. *Katwaru Ram* (1) followed. *Vijiyaraghavalu Naidu* v. *Srinivasalu Naidu* (2) distinguished.

THE facts of this case are as follows :—

An application was presented within time for attachment of certain house property. An objection was filed to this attachment, which was rejected on the 18th December 1903. On the 12th of January 1904 the objectors instituted a regular suit. In consequence of this suit the Court postponed the sale of the property and struck off the application. On the 7th September 1904 the suit was dismissed, but on appeal it was decreed by the District Judge. The decree-holders preferred a second appeal to the High Court, which was decided in their favour. Whilst the case was pending in this Court the decree-holders, as a matter of precaution, applied for the arrest of the judgment-debtor. This application has been rejected by the Court below on the ground that there had been no application to the Court to take any step in aid of the execution within three years previously to the application for arrest. The decree-holders appealed to the High Court contending that this application was not barred by limitation.

Mr. *W. Wallach* and Munshi *Gokul Prasad*, for the appellants.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.— This is a decree-holder's appeal in proceedings arising out of the execution of the decree. An application was presented within time for attachment of certain house property. An objection was filed to this attachment, which was rejected on the 18th December

* First Appeal No. 140 of 1907 from a decree of Amjad Ullah, Subordinate Judge of Mirzapur, dated the 9th of February 1907.

(1) (1900) I. L. R., 22 All., 358. (2) (1905) I. L. R., 28 Mad., 399.

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1903. On the 12th of January 1904 the objectors instituted a regular suit. In consequence of this suit the Court postponed the sale of the property and struck off the application. On the 7th September 1904 the suit was dismissed, but on appeal it was decreed by the District Judge. The decree-holders preferred a second appeal to this Court, which has been decided in their favour. Whilst the case was pending in this Court the decree-holders, as a matter of precaution, applied for the arrest of the judgment-debtors. This application has been rejected by the Court below on the ground that there had been no application to the Court to take any step in aid of the execution within three years previously to the application for arrest.

The decree-holders come here in appeal. The learned counsel who appears for them relies on the payment of process fees made on his application to attach the house within three years of the present application to arrest. In support of this case he refers to a decision of the Madras High Court—*Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (1). That case is in our judgment distinguishable from the present, as it appears that the document along with which the process fees were deposited did ask the Court to issue a sale proclamation: it clearly therefore fell within the language of article 179(4) of the second schedule of the Limitation Act. In this case when the process fees were paid no application was made to the Court to do anything. The decision of our brother Banerji in *Thakur Ram* v. *Katwaru Ram* (2) supports the view taken by the Court below, and with that decision we are in accord.

At the same time we are of opinion that the order now under appeal has not the effect of deciding that the decree has become time-barred. As said above, the application to attach and sell the house property was made within time. The granting of that application was suspended, not from any fault of the decree holders, but owing to the institution of the suit referred to above.

That suit has been finally decided in the decree-holders' favour by this Court on the 5th January 1907, and the dismissal of the application for arrest made while the application for

(1) (1905) I. L. R., 28 Mad., 399. (2) (1900) I. L. R., 22 All., 358.

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attachment and sale was in suspense will not, in our opinion, have the effect of preventing the decree-holders from exercising their right, now that the suit instituted by the objectors has been decided in their favour, to ask the Court to go on with the application for attachment and sale, which must be deemed to have been in suspense pending the decision of the suit. The order under appeal, however, cannot successfully be assailed, and we dismiss this appeal. Under the circumstances we make no order as to costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1908 *February* 26.

SHAHBAZ KHAN AND OTHERS (PLAINTIFFS) *v.* UMRAO PURI AND OTHERS (DEFENDANTS).*

Public nuisance—Killing of cows by Muhammadans—Custom.

Under certain limitations the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in so doing he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. The right of Muhammadans to slaughter kine is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with. *Muttumira* v. *Queen-Empress* (1), *Queen-Empress* v. *Byramji Edalji* (2), *Queen-Empress* v. *Zaki-ud-din* (3), *Queen-Empress* v. *Imam Ali* (4), *Romesh Chunder Sannyal* v. *Hiru Mondal* (5) and *Hadjee Muzhur Ali* v. *Gundowree Sahoo* (6) referred to.

THIS was a suit brought by certain Muhammadan inhabitants of the village of Behta Goshain in the district of Budaun asking for a declaration of their right to slaughter cows within their own premises in the village for the purpose of daily food as well as for sacrifice under any limitation or otherwise. The circumstances which led to the institution of the suit are detailed in the judgment of the Court, but, briefly, the suit was instituted in consequence of certain Hindus having procured from the District Magistrate of Budaun an order prohibiting the slaughter of cattle altogether in the village of Behta Goshain. The defendants denied the right claimed by the plaintiffs and put forward

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* First Appeal No. 247 of 1905 from a decree of L. H. Turner, District Judge of Shahjahanpur, dated the 22nd of July 1905.

(1) (1884) I. L. R., 7 Mad., 590.
(2) (1887) I. L. R., 12 Bom., 437.
(3) (1887) I. L. R., 10 All., 44.
(4) (1887) I. L. R., 10 All., 150.
(5) (1890) I. L. R., 17 Calc., 852.
(6) (1876) 25 W. R., Cr. R., 72.

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the case that there was no custom of slaughtering or sacrificing cows in their village, and that the plaintiffs were not competent to do anywhere in the village, any act which might be injurious or annoying to the defendants or repugnant to their religious feelings. They also denied that a suit of the kind was cognizable by a Civil Court. The suit was tried by the District Judge of Shahjahanpur, who found that the suit was cognizable by a Civil Court, but dismissed it upon the ground that the plaintiffs had failed to prove the existence of any such custom of slaughtering cows, either for food or sacrifice, as would entitle them to the decree they asked for. He further found that the plaintiffs could in no case be entitled to a declaration as against the world of their right to slaughter cattle. The plaintiffs appealed against the dismissal of their suit to the High Court.

Maulvi *Ghulam Mujtaba* and Maulvi *Muhammad Ishaq*, for the appellants.

Dr. *Tej Bahadur Sapru*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The litigation which has led to this appeal might, we think, have been avoided by the exercise of some common sense and toleration. The question before us is whether the members of the Muhammadan community in the village of Behta Goshain in the district of Budaun have a right to slaughter cows within their own premises in the village for the purpose of daily food as well as for sacrifice under any limitation or otherwise. The village in question has a population of about 3,000, of whom less than a thousand are Muhammadans and the remainder Hindus. The defendants on the 16th of November 1903 applied to the District Magistrate of Budaun for an order that the Muhammadans in the village might be forbidden to slaughter kine in the village. A charge was thereupon preferred against the plaintiff Shabhaz Khan and others, purporting to be under section 107 of the Code of Criminal Procedure. On the 6th of December 1903, the District Magistrate passed an order prohibiting the slaughter of any cattle in the village. In his order he states as follows :—" It appears that the Hindus far outnumber the Muhammadans. I find there are other villages in this thana circle where slaughter never takes place and where it would be strongly objected to, at Bilsi itself,

for instance. There is in fact a general understanding that it should only be allowed in places where it has been customary. For these reasons I forbid it in Behta Goshain." The following also appears in the order:—"As there is some ill-feeling over the matter, a copy of this order is to go to the Sub-Divisional Magistrate with a view to proceedings under section 107 of the Code of Criminal Procedure. If any action is taken the leaders of both sides should be bound over, but as the Muhammadans are in the wrong no security more than is absolutely necessary should be taken from the Hindus." Although this order purports to have been passed under section 107 it is clear that it was not an order under that section. Whether indeed it is anything more than mere *brutum fulmen* it is difficult to say, but, whatever it be, it is clear that the members of the Muhammadan community in the village of Behta Goshain cannot slaughter kine except at the risk of criminal proceedings. This order of the Magistrate was confirmed by the Commissioner on the 18th of February 1904.

The plaintiffs, feeling aggrieved at the prohibition of the exercise of what they conceived to be their legal rights, instituted the suit out of which this appeal has arisen.

The defendants took defence and denied the right claimed by the plaintiffs and put forward the case that there was no custom of slaughtering or sacrificing cows in their village, and that the plaintiffs were not competent to do anywhere in the village any act which might be injurious or annoying to the defendants or repugnant to their religious feelings. They also denied that a suit of the kind was cognizable in the Civil Court. The learned District Judge decided this last issue in favour of the plaintiffs, and we think rightly. The right denied was, as he said, a right of a substantial and valuable nature and not of the nature of a right to a mere dignity or privilege unconnected with fees or emoluments, such as were dealt with in the cases to which he referred. He, however, dismissed the plaintiffs' claim on the ground that they had failed to prove that they had continuously slaughtered kine for consumption at the slaughter-house in the village, or had continuously in observance of the sacrifice of kurbani killed kine on the Id-ul-Zuha in the slaughter-house or in their houses. The

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burden of proving such custom he laid upon the plaintiffs and dismissed the suit. He further found that the plaintiffs could in no case be entitled to a declaration as against the world of a right to slaughter cattle.

The appeal before us was then preferred, and the main contention advanced on behalf of the appellants is that the Court below was wrong in holding that the suit was based on custom alone; that independently of any custom every Muhammadan has a right to do all lawful acts with and upon his own property, and if any one interfere with the exercise of his legal rights to obtain from the Court a declaration of such rights; that the killing of cows on their own land not being an unlawful act, the plaintiffs were entitled to a decree irrespective of any custom; and further that the Court below was wrong in holding that the relief sought was claimed against the whole world and could not be granted as against the defendants alone.

Now upon the main question we should in the first place premise that the slaughter of cattle under certain circumstances would be a public nuisance, and it might also be obnoxious to rules and regulations lawfully promulgated for observance in a town or village, and further that kine must not be slaughtered in such places or manner as to be a nuisance or in contravention of any such rules and regulations. We may also say that it is in the highest degree desirable that the members of the different religious persuasions who are to be found in this country should, in the observance of their religious ceremonies as well as in the exercise of their lawful rights, show respect for the feelings and sentiments of those belonging to different persuasions, and avoid anything calculated to irritate the religious susceptibilities of any class of the community. But when a question in which the ordinary rights of property are involved comes before us, we must, before we can allow those rights to be infringed, endeavour to find the existence of some principle or rule of law justifying a ruling that the wishes or susceptibilities of individuals can be allowed to override such rights. Acts calculated to offend the sentiments of a class do not necessarily amount to a public nuisance. *Lex non favet votis delicatorum*—The law makes no allowance for the susceptibilities of the hyper-sensitive. In our judgment, then, we shall

deal simply with the broad question whether the right to slaughter kine on their own premises by Muhammadans in the village of Behta Goshain is illegal. Turner, C.J., in the case of *Muttumira* v. *Queen-Empress* (1) observed :—"A public nuisance is defined by the Penal Code as an act or omission which causes any common injury, danger or annoyance to the public or people in general who dwell or occupy property in the vicinity, or which must necessarily cause obstruction, danger or annoyance to persons who may have occasion to use any public right. It is obvious from the language of the Act that it was not intended to apply to acts or omissions calculated to offend the sentiments of a class. In this country it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds." In the case of *Queen-Empress* v. *Byramji Edalji* (2) an accused appealed against his conviction of an offence under section 268 of the Indian Penal Code in having cut up in his verandah meat which was to be cooked for a dinner party, exposing it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by. The Magistrate had found the accused guilty of committing a public nuisance, on the ground that he had done an act by which several persons who were Jains were much annoyed, they having a great repugnance to the taking of life under any circumstances. The conviction was set aside by Birdwood and Parsons, JJ., who in the course of their judgment observed that the annoyance complained of "neither did nor could cause any sensible or real damage. It was an annoyance merely by reason of its hurting the feelings of the Jains, who have a repugnance to the killing of animals. It was thus of the nature of a sentimental grievance which could be felt only by persons holding certain views as to the killing of animals." In the case of *Queen-Empress* v. *Zaki-ud-din* (3) certain Muhammadans had been convicted on a charge of having for a religious purpose killed and cut up two cows before sunrise in a private compound partly visible from a public road, the killing of one cow being witnessed by a Hindu. It was held by Brodhurst, J., on an application for

(1) (1884) I. L. R., 7 Mad., 590. (2) (1887) I. L. R., 12 Bom., 437.
(3) (1887) I. L. R., 10 All., 44.

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revision of the order of conviction passed by the Magistrate under section 290 of the Indian Penal Code, that the circumstances proved did not amount to the commission of a public nuisance as defined in section 268 of the Code. Further, in the case of *Queen-Empress* v. *Imam Ali* (1) it was held by a Full Bench of this High Court that a cow was not "an object within the meaning of section 295 of the Indian Penal Code," and that the slaughter of a cow was not an offence under that section. The decision in *Romesh Chunder Sannyal* v. *Hiru Mondal* (2) is to the same effect.

In an earlier case in the Calcutta High Court, namely, *Hadjee Mâzhur Ali* v. *Gundowree Sahoo* (3) the legality of an order passed by a Deputy Magistrate in a prosecution under section 521 of the Criminal Procedure Code then in force, in which he treated the slaughter of cattle as a nuisance and ordered its discontinuance within a private enclosure belonging to some Muhammadans, was considered. Kemp and Glover, JJ., held that, although the act complained of might be shocking to the prejudices of Hindus, it could not properly be regarded as a nuisance, and that at any rate, the act being done in a private place and not on a thoroughfare, it could not be dealt with under section 521. In the course of their judgment the learned judges say "that Hindus should object with all their strength to the killing of cows in an enclosure within a few yards of their dwelling is natural enough, but this would not make such killing a nuisance in the legal sense of the term. The animals were sacrificed within a walled enclosure; no one could see the process from the outside, and it is not alleged that the sacrifices were made occasion for noisy or riotous demonstration which could affect the comfort of the neighbours. It was simply and solely a matter of religious feeling. The complainant had no objection to other animals being sacrificed within the enclosure in question; he even suggested that the petitioners might kill sheep or camels there if they liked—what he objected to was the slaughter of the sacred cow."

(1) (1887) I. L. R., 10 All., 150. (2) (1890) I. L. R., 17 Calc., 852.
(3) (1876) 25 W. R., Cr. R. 72.

The same question came before a Bench of this Court in Second Appeal No. 1028 of 1881 in the case of *Raghubar Dayal* v. *Ameeran Jahan* (unreported). In that case the respondent Ameeran Jahan brought a suit for a declaration of her right to offer a cow in sacrifice annually on certain days within the enclosure of her house, and, notwithstanding an order of the Deputy Magistrate forbidding the sacrifice, a decree was passed in her favour whereby the defendants were restrained from interfering with the sacrifice of an Id-ul-zuha victim of any kind on the premises of the plaintiff during the 10th, 11th and 12th days of the month of *Zilhig*, provided that the sacrifice should be completed within the inner quadrangle of the house and that from the commencement to the completion of the sacrifice the outer doors of the house should be kept closed, and provided also that the decree should have no effect as against any rule or regulation of the Municipality of Shahjahanpur, the town in which the parties resided, which might thereafter be promulgated regarding Id-ul-Zuha sacrifices in general. The decision of the learned officiating Judge was affirmed by Brodhurst and Tyrrell, JJ., on the 4th of May 1882.

In view of these authorities it appears to us indisputable that under certain limitations the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in doing so he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others. The learned District Judge was wrong in our judgment in holding that the *onus* lay upon the plaintiff appellants of proving the existence of a custom allowing the slaughter of kine in their village. The right claimed is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with.

We therefore allow the appeal, set aside the decree of the Court below and give a decree to the plaintiffs declaring that they have the right which they claim, namely, to slaughter cows in the *mazbah* belonging to them in Behta Goshain for daily consumption as also for consumption at festivals, and in their

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houses for the purpose of sacrifice, provided that in the exercise of such right they do not commit a nuisance or offend any rule or regulation lawfully promulgated and applicable to that village. We also grant an injunction restraining the defendants from interfering with the rights of the plaintiffs appellants as above declared. The defendants respondents must pay the costs of this appeal as also the costs in the Court below.

Appeal decreed.

1908 *February* 26.

Before Mr. Justice Banerji and Mr. Justice Richards.

THAKUR PRASAD AND ANOTHER (PLAINTIFFS) *v.* GAURIPAT RAI AND ANOTHER (DEFENDANTS).*

Act No. VIII of 1890 *(Guardians and Wards Act), sections* 29 *and* 31—*Guardian and minor—Mortgage of minor's property to secure a loan sanctioned by the Court—Interest.*

In all cases where sanction is given for the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction not only the amount to be raised and the property to be mortgaged, but also the rate of interest, or at least the maximum rate of interest, at which the loans are to be raised. If nothing is said in the order as to the rate of interest, the lenders are entitled only to a reasonable rate of interest on the moneys advanced. *Ganga Pershad Sahu* v. *Maharani Bibi* (1) followed.

THE facts which gave rise to this appeal were as follows:—

The suit was one for sale upon two mortgages, dated respectively the 14th and the 18th of June 1897. The mortgages were executed by one Sripat Rai as the guardian of the defendants respondents Gauripat Rai and Kamlapat Rai with the sanction of the District Judge. The amount of the first mortgage was Rs. 1,400 and that of the other Rs. 1,800 and they carried interest at the rate of Re. 1-8 per cent. per mensem, that is, Rs. 18 per cent. per annum. The learned judge in granting sanction for the raising of the loans permitted the guardian Sripat Rai to raise as much as he could by hypothecating a one anna share, though he directed the guardian not to spend more than Rs. 1,100 on the marriage of Gauripat Rai, the first respondent for the expenses of which the loan was to be raised.

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* First Appeal No. 129 of 1906 from a decree of Achal Bihari, Subordinate Judge of Gorakhpur, dated the 8th of February 1906.

(1) (1884) I. L. R., 11 Calc., 379.

The Court below has found that the plaintiff actually paid Rs. 1,400 on account of the first bond. As for the second bond it was represented to the Judge that Rs. 1,887 were required for redeeming certain ornaments which had been pawned with one Kali Charan. The learned Judge sanctioned the raising of that loan, and the ornaments are said to have been redeemed. The Court below allowed to the plaintiffs interest at the rate of 12 per cent. per annum, which it considered to be reasonable, and reduced the contractual rate, on the ground that the District Judge in sanctioning the raising of the loans did not specify the rate of interest at which the loans were to be taken. The plaintiffs appealed to the High Court urging that they were entitled to the full contractual rate of interest on the mortgages in suit.

The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Gulzari Lal*, for the appellants.

Mr. *Abdul Raoof* and Munshi *Ishwar Saran*, for the respondents.

BANERJI and RICHARDS, JJ.—This was a suit for sale upon two mortgages, dated respectively the 14th and the 18th of June 1897. The mortgages were executed by Sripat Rai as the guardian of the respondents with the sanction of the District Judge. The amount of the first mortgage was Rs. 1,400 and that of the other Rs. 1,800, and they carried interest at the rate of Re. 1-8 per cent. per mensem, that is, Rs. 18 per cent. per annum. The learned Judge in granting sanction for the raising of the loans permitted the guardian Sripat Rai to raise as much as he could by hypothecating a one-anna share, though he directed the guardian not to spend more than Rs. 1,100 on the marriage of Gauripat Rai, the first respondent, for the expenses of which the loan was to be raised. The Court below has found that the plaintiff actually paid Rs. 1,400 on account of the first bond. As for the second bond, it was represented to the Judge that Rs. 1,887 were required for redeeming certain ornaments which had been pawned with one Kali Charan. The learned Judge sanctioned the raising of that loan, and the ornaments are said to have been redeemed. The Court below allowed to the plaintiffs interest at the rate of 12 per cent. per annum, which it considered to be reasonable, and reduced the contractual rate, on the ground that the District

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Judge in sanctioning the raising of the loans did not specify the rate of interest at which the loans were to be taken. The course adopted by the Court below is justified by the ruling of their Lordships of the Privy Council in *Ganga Pershad Sahu* v. *Maharani Bibi* (1).

We are of opinion that in all cases where sanction is given for the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction, not only the amount to be raised and the property to be mortgaged, but also the rate of interest or at least the maximum rate of interest at which the loans are to be raised. This was not done by the learned Judge in this case, and therefore the plaintiffs are only entitled to a reasonable rate of interest. We see no reason to differ from the opinion of the Court below that 12 per cent. per annum was a reasonable rate in the present case. This is the only question raised in the appeal of the plaintiffs. The appeal must therefore fail, and we accordingly dismiss it.

The respondents have preferred objections under section 561 of the Code of Civil Procedure to the effect that the Court below should not have allowed to the plaintiffs a decree for Rs. 300 out of the amount of the first bond and for Rs. 400 out of the amount of the second bond. It is alleged on their behalf that these amounts were not actually paid. The evidence on the point is not satisfactory. On the contrary, as the Court below finds, the account books of the plaintiffs and the evidence adduced on their behalf prove the payment of the full amounts of the two bonds. As for Rs. 300 out of the amount of the first bond which exceeded the amount which the District Judge had authorized the guardian to spend on the marriage of one of the minors, we think, having regard to the form of the order made, that the creditor is entitled to recover what he actually paid. As we have said above, the Court below has found that the amount of the first bond was actually paid by the plaintiffs, and we see no reason to come to a different conclusion. We accordingly dismiss the objections also. The appellants will pay the costs of the appeal and the respondents the costs of the objections.

Appeal dismissed.

(1) (1884) I. L. R., 11 Calc., 879.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

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March 3.

GULZARI MAL AND ANOTHER (DEFENDANTS) *v.* KABIR-UN-NISSA (PLAINTIFF).*

Civil Procedure Code, section 562—Remand—Appeal from order of remand after decision of the suit in accordance therewith.

Held that no appeal will lie from an order of remand passed under section 562 of the Code of Civil Procedure, if such appeal is filed after the suit has been decided in compliance with the order of remand and no appeal is preferred from the decree in the suit. *Salig Ram* v. *Brij Bilas* (1) and *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2) followed.

THIS was an appeal from an order of remand. The order appealed against was passed on the 12th of November 1906. Under that order the case went to the Court of first instance, and was by that Court decreed in favour of the plaintiff respondent on the 28th of January 1907. The present appeal, though it bears an endorsement of the stamp reporter, dated the 19th of January 1907, was not presented until the 29th January 1907, one day after the decree in plaintiff's favour had been passed. The appellants filed no appeal from the decree which had been passed against them. At the hearing a preliminary objection was raised on behalf of the respondent that no appeal lay, in as much as it had not been filed until after the suit had been re-heard in pursuance of the order under appeal, and this objection was supported by the two rulings referred to in the judgment of the Court.

Mr. *C. Ross Alston* and Munshi *Gokul Prasad*, for the appellants.

Maulvi *Ghulam Mujtaba*, for the respondent.

AIKMAN and KARAMAT HUSEIN, JJ.—This is an appeal from an order of remand. A preliminary objection to the hearing of this appeal is raised by the learned vakil for the respondent. It appears that the order of remand now appealed against was passed on the 12th of November 1906. Under that order the case went to the Court of first instance, and was by that Court decreed in favour of the plaintiff respondent on the 28th of January 1907. The present appeal, though it bears an endorsement of the stamp reporter, dated the 19th of January 1907,

* First Appeal No. 5 of 1907, from an order of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 12th of November 1906.

(1) (1907) I. L. R., 29 All., 659. (2) (1905) I. L. R., 32 Calc., 1023.

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was not presented until the 29th January 1907, one day after the decree in plaintiff's favour had been passed.

The appellants filed no appeal from the decree which had been passed against them. In support of his objection the learned vakil for the respondent relies on a decision of the Calcutta High Court in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1), and on a decision of this Court in *Salig Ram* v. *Brij Bilas*, (2). These decisions support the preliminary objection taken. Were the matter *res integra* there might be something to be said in appellants' behalf; but we are bound by the decision of this Court. When the case went back to the Court of first instance, it was heard in the presence of the defendants, who, we are told, adduced evidence. We consider that the defendants, if they intended to appeal from the order of remand, might well have asked the Court of first instance to defer hearing the case until their appeal against the order of remand had been disposed of; but they did not do so. We are bound by the decision in the case of *Salig Ram* v. *Brij Bilas*, mentioned above. We, therefore, sustain the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

1908 *March* 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

TUHI RAM (PLAINTIFF) *v.* IZZAT ALI AND OTHERS (DEFENDANTS).*

Execution of decree—Sale of ancestral property—Civil Procedure Code, section 320—Rules framed by Local Government—Application under Rule 17 (XIIIA).

One of several co-owners of ancestral property which had been sold by the Collector under the Rules † framed by the Local Government under section 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending, applied under Rule 17 (XIIIA) to have the sale set aside, making at the same time the necessary payments into Court required by the Rule.

† The rules referred to are as follows :—

17 (XII). The decree-holder, or any person whose immovable property has been sold under these rules, may apply to the Collector to set aside the sale

* First Appeal No. 99 of 1906 from a decree of H. David, Subordinate Judge of Meerut, dated the 17th of February 1906.

(1) (1905) I. L. R., 32 Calc., 1023. (2) (1907) I. L. R., 29 All., 659.

Held that upon the presentation of the latter application under Rule 17 (XIIIA) the Collector was bound to set aside the sale, and was in no way precluded from so doing by the existence of the former application under Rule 17 (XII). *Net Lall Sahoo* v. *Sheikh Kareem Bux* (1) and *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (2) referred to.

THE facts of this case are as follows. One Multan Singh obtained a decree for sale on a mortgage made by the defendants, and in execution of that decree had the property put up for sale. Part of the property was non-ancestral, and this portion was sold by the Civil Court. The remainder being ancestral, the sale of it was transferred to the Collector. On the 20th of September 1904, the Collector sold this portion to the plaintiff for a sum of Rs. 25,000. On the 5th of October 1904, Izzat Ali, one of the co-owners of the property, filed an objection to the sale alleging material irregularities in its conduct and consequent loss of a substantial nature, and praying that the sale should be set aside under

on the ground of a material irregularity in publishing or conducting it, and in the event of the sale being set aside, the Collector may sanction the refund of auction fees.

But no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Collector that he has sustained substantial injury by reason of such irregularity.

17 (XIII). If no such application as is mentioned in the last preceding rule be made or if such application be made and the objection be disallowed, the Collector shall pass an order confirming the sale as regards the parties to the suit and the purchaser.

If such application be made, and if the objection be allowed, the Collector shall pass an order setting aside the sale.

17 (XIIIA). Any person whose immovable property has been sold may, at any time within 30 days from the date of sale, apply to the Collector to have the sale set aside on his depositing in Court—

(a) for payment to the purchaser, a sum equal to 5 per cent of the purchase money; and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

If such deposit is made within 30 days the Collector shall pass an order setting aside the sale: Provided that, if a person applies under rule 17 (XII) to set aside the sale of his immovable property, he shall not be entitled to make an application under this rule. Nothing in this rule shall be construed to relieve the judgment-debtor from any liability he may be under, in respect of costs and interest not covered by the proclamation of sale.

(1) 1896) I. L. R., 23 Calc., 686. (2) (1901) I. L. R., 29 Calc., 1.

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Rule 17 (XII) of the Rules framed by Government under section 320 of the Code of Civil Procedure. On the 19th October following one of the defendants, Abdul Hai, also a co-owner, applied to the Collector under Rule 17 (XIIIA) to have the sale set aside, despositing at the same time in Court a sum equal to 5 per cent. of the purchase money and also the amount of the decree. His application was rejected by the Collector on the 11th of November 1904, on the ground, apparently, that there was pending an application by Izzat Ali to have the sale set aside on the ground of material irregularity in the conduct of it. An appeal was preferred to the Commissioner of the Meerut Division, with the result that, allowing the appeal, he set aside the order confirming the sale. The present suit was then instituted by the auction purchaser asking that the sale at which he purchased might be declared a good and valid sale. The Court of first instance (Subordinate Judge of Meerut) found that the sale was invalid and dismissed the suit. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The matters which have led to this appeal are shortly as follows:—One Multan Singh obtained a decree for sale on a mortgage made by the defendants, and in execution of that decree had the property put up for sale. Part of the property was non-ancestral and this portion was sold by the Civil Court. The remainder being ancestral, the sale of it was transferred to the Collector. On the 20th of September 1904, the Collector sold this portion to the plaintiff for a sum of Rs. 25,000. On the 5th of October 1904, Izzat Ali, one of the co-owners of the property, filed an objection to the sale alleging material irregularities in its conduct and consequent loss of a substantial nature, and praying that the sale should be set aside under Rule 17 (XII). On the 19th October following one of the defendants, Abdul Hai, also a co-owner, applied to the Collector under Rule 17 (XIIIA) to have the sale set aside, depositing at the same time in Court a sum equal to 5 per cent. of the purchase money and also the amount of the decree. His

application was rejected by the Collector on the 11th of November 1904, on the ground, so far as we understand the order, that there was pending an application by Izzat Ali to have the sale set aside on the ground of material irregularity in the conduct of it. The Collector seems to have held that Abdul Hai, one of the owners of the property, could not apply under Rule 17 (XIIIA) so long as there was pending an application on the part of another co-owner under Rule 17 (XII). In his order the Collector says:—"It has been urged that he (*i.e.*, Abdul Hai) is only a mortgagor under the second mortgage represented by the amount of Rs. 2,234-8-0 and that Izzat Ali is a mortgagor under the first mortgage also represented by the amount of Rs. 24,632; that they are therefore different persons. I am unable to accept this contention. They are both judgment-debtors and originally joint defendants in the suit, and I hold that Abdul Hai is not entitled to make the application under section 310A unless the application under section 311 is withdrawn." He therefore, as the application of Izzat Ali had not been withdrawn, rejected the application of Abdul Hai. We do not profess to understand exactly the meaning of the language used by the Collector, but we take it that he refused the application of Abdul Hai on the ground that he alone was not a person who could apply under Rule 17 (XIIIA). We may point out that by oversight he cited in his order section 310A and section 311 of the Code of Civil Procedure instead of Rule 17 (XII) and 17 (XIIIA) of the Rules of Government passed under section 320.

An appeal was preferred to the Commissioner of the Meerut Division, with the result that, allowing the appeal, he set aside the order confirming the sale. In consequence of this order the present suit was instituted.

The Rules to which we have referred are Rules framed by the Local Government under section 320 of the Code of Civil Procedure for regulating the sale of ancestral lands by the Collector. Rule 17 (XIIIA) corresponds with section 310A of the Code. The Court below dismissed the plaintiff's suit and hence this appeal.

It was argued before us at considerable length that no appeal lay from the Collector's order to the Commissioner, but in the

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view which we take of the case it is unnecessary to determine this question. It appears to us that when Abdul Hai deposited the money required to be deposited by the Rule in question the Collector was bound to pass an order setting aside the sale and had no option in the matter. The language of the Rule is as follows:—" If such deposit is made within 30 days the Collector *shall pass an order setting aside the sale.*" But it is said that the proviso to the section justified the Collector in passing the order now impeached. That proviso is that if a person applies under Rule 17 (XII) to set aside the sale of his immovable property, he shall not be entitled to make an application under this Rule, that is Rule 17 (XIIIA). The contention is that inasmuch as Izzat Ali, one of the co-owners, made the application to which we have referred under Rule 17 (XII), Abdul Hai could not, in view of the language of the section, succeed in an application to have the sale set aside under Rule 17 (XIIIA). It is said that "any person whose immovable property has been sold" must mean all the owners of the property and not a single co-sharer, and that Abdul Hai being only a co-sharer without the concurrence of the other co-sharers could not take advantage of the rule. We are unable to take this view of the section. It appears to us that the words "any person whose immovable property has been sold" enable co-sharers of the property which has been sold to apply to the Court to have the sale set aside, and that it is not necessary that all the co-sharers should join in the application. So soon as Abdul Hai made his application and paid the money as required by the Rule, it was in our opinion the duty of the Collector to pass an order setting aside the sale. He ought not, after the deposit was made, to have entertained the application which was made by Izzat Ali. We are confirmed in this view of the section by two decisions of the Calcutta High Court, namely in *Net Lall Sahoo* v. *Sheikh Kareem Bux* (1) and *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (2). Whether or not, therefore an appeal lay to the Commissioner, we are of opinion that the Collector acted *ultra vires* in proceeding to confirm the sale

(1) (1896) I. L. R., 23 Calc., 686. (2) (1901) I. L. R., 29 Calc., 1.

after Abdul Hai had made the deposit and filed an application to have the sale set aside under the provisions of Rule 17 (XIIIA). We therefore dismiss the appeal with costs.

Appeal dismissed.

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TUHI RAM v. IZZAT ALI.

APPELLATE CIVIL.

1908 *March 5.*

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

ASHARFI KUNWAR AND OTHERS (DEFENDANTS) *v.* RUP CHAND (PLAINTIFF).*

Hindu law—Adoption—Jains—Custom—Adoption of married man—Suit for declaration of invalidity of adoption—Burden of proof.

Held that according to the law and custom prevailing amongst the Jain community a widow has a power to adopt a son to her deceased husband without any special authority to that effect, and if there are two widows the senior widow may adopt without the concurrence of the junior widow. A widow is also competent, with the consent of the *sapindas*, to give a son in adoption after the death of her husband.

Held also that, adoption being amongst the Jains a purely secular institution, there is no legal objection to the adoption of a married man. *Manohar Lal* v. *Banarsi Das* (1) followed. *Chotay Lall* v. *Chunno Lall* (2), *Amava* v. *Mahadgauda* (3), *Sri Balusu Gurulingasuami* v. *Sri Balusu Ramalakshmamma* (4) and *Radha Mohan* v. *Hardai Bibi* (5), referred to.

Held also that where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is still on him to make out a *primâ facie* case that the adoption challenged by him is invalid in law or never took place in fact. *Brojo Kishoree Dassee* v. *Sreenath Bose* (6) and *Sardar Singh* v. *Ram Kunwar* (7), followed. *Tacoordeen Tewarry* v. *Ali Hossein Khan* (8) referred to. *Tarinee Churn Chowdhry* v. *Sharoda Soonduree Dossee* (9), *Chowdhry Pudum Singh* v. *Koer Oddey Singh* (10), *Gooroo Prosunno Singh* v. *Nil Madhub Singh* (11) and *Har Dyal Nag* v. *Roy Krishto Bhoomick* (12) distinguished.

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* First Appeal No. 32 of 1906 from a decree of Nihal Chandar, Subordinate Judge of Saharanpur, dated the 8th of November 1905.

(1) (1907) I. L. R., 29 All., 495.
(2) (1878) L. R., 6 I. A., 15.
(3) (1896) I. L. R., 22 Bom., 416.
(4) (1899) I. L. R., 22 Mad., 398.
(5) (1899) I. L. R., 21 All., 460.
(6) (1868) 9 W. R., 463.
(7) Weekly Notes, 1902, p. 62.
(8) (1874) L. R., 1 I. A., 192: at p. 206.
(9) (1869) 11 W. R., 468.
(10) (1869) 12 W. R., P. C. R., 1.
(11) (1873) 21 W. R., 84.
(12) (1875) 24 W. R., 107.

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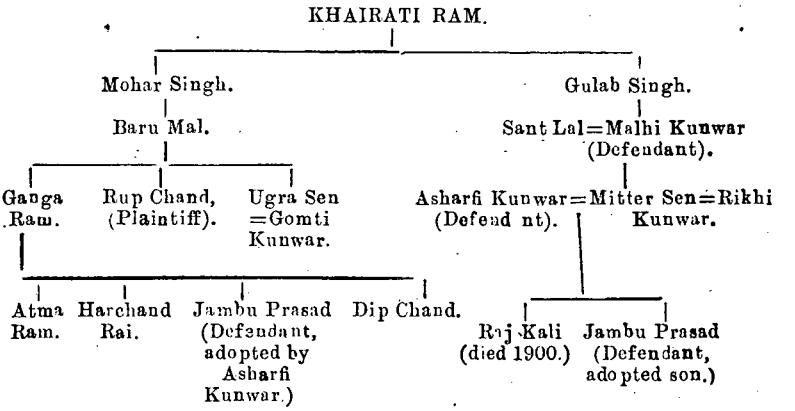
The following genealogical table indicates the relationship between the parties to this appeal :—



The parties were mahajans of the Jain sect, living at Saharanpur. Mitter Sen, who was the owner of considerable property, both movable and immovable, died in 1890, leaving him surviving two widows, Asharfi Kunwar, the senior widow, and Rikhi Kunwar, the junior widow, his mother, Malhi Kunwar, and a daughter, Raj Kali. Raj Kali died in 1900, and Rikhi Kunwar before the filing of the present suit. This suit was filed in 1904 by Rup Chand asking for a declaration that the ostensible adoption of Jambu Prasad after the death of Mitter Sen by the senior widow Asharfi Kunwar was null and void, and for the cancellation of a deed of adoption executed by Asharfi Kunwar on the 14th of April 1900. The *factum* of the adoption was not seriously questioned, but its legality was disputed on various grounds, principally upon the ground that Jambu Prasad was at the time of the adoption of the age of 23 years and already married. The court of first instance (Subordinate Judge of Saharanpur) decreed the plaintiff's claim, mainly upon the ground that no custom had been proved whereby it was lawful to adopt a married person, and that in absence of proof of a special custom, the ordinary Hindu law applied. Against this decree the defendants appealed to the High Court.

Mr. *W. Wallach*, Babu *Jogindro Nath Chaudhri*, the Hon'ble Pandit *Sundar Lal*, Pandit *Moti Lal Nehru*, Dr. *Satish Chandra Banerji* and Mr. *R. Malcomson*, for the appellants.

Mr. *E. A. Howard*, the Hon'ble Pandit *Madan Mohan Malaviya*, Dr. *Tej Bahadur Sapru*, and Babu *Lalit Mohan Banerji*, for the respondent.

STANLEY, C.J., and BURKITT, J.:—The main question raised in this appeal is whether amongst the Jain community marriage is a bar to adoption. Several other questions have been discussed before us which also must be determined. The suit out of which it has arisen was brought by Lala Rup Chand, claiming to be the heir of Lala Mitter Sen, to have a declaration that an alleged adoption of the defendant Jambu Prasad by Musammat Asharfi Kunwar, the widow of Lala Mitter Sen never took place, and that, if it did take place, it was contrary to Hindu Law and therefore void. The plaint also contains a prayer for a declaration that a document described as a deed of adoption in favour of Jambu Prasad, dated the 14th of April 1900, executed by Musammat Asharfi Kunwar was null and void. No other relief than these declarations was claimed.

Lala Mitter Sen died in the year 1890, leaving two widows, namely, Musammat Asharfi Kunwar and Musammat Rikhi Kunwar, and also a daughter, Musammat Raj Kali, him surviving. He was possessed of immovable property of considerable value, and of movable property besides. At the time of his alleged adoption Jambu Prasad was 23 years old and a married man. Musammat Raj Kali died in the month of June 1900, and during the pendency of this litigation both Musammat Rikhi Kunwar and Musammat Asharfi Kunwar have died.

As to the *factum* of the adoption, the plaintiff did not produce any evidence whatever in support of his case that there was no adoption, contending that the burden of proving his adoption lay on the defendant. This appears from a proceeding recorded by the Subordinate Judge on the 2nd of August 1905. On the 8th of August, as appears from the record, the plaintiff stated that he had come to know of the adoption on the 14th of April 1900, and the plaintiff's pleader made a statement to the like effect, and it also appears that the plaintiff made an application to the Court in May 1905 to have a further issue added, in which the adoption of Jambu Prasad was impliedly admitted, but in which a suggestion was made that Musammat Rikhi

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Kunwar, the co-wife of Musammat Asharfi Kunwar, had also made an adoption. The issue so sought to be added was in these terms: "Whether on the day and at the time of the adoption of Jambu Prasad any other adoption was made by the second wife of Lala Mitter Sen. If so, what was its effect?" This application was, on the 13th of May 1905, directed to be filed with the record. Some evidence was as a matter of fact given incidentally by the defendants' witnesses in proof of the adoption. The learned Subordinate Judge held that it lay upon the plaintiff to give some evidence in support of his allegation that there was no adoption in fact of the defendant Jambu Prasad, and, the plaintiff having refused to give any such evidence, in the absence of such, decided the issue as to adoption in favour of the defendant. But he held upon the main question that the adoption of a married boy amongst the Jains was illegal. The validity of the adoption by a Jain of a married boy was considered by this Bench in the case of *Manohar Lal* v. *Banarsi Das* (1) in which after lengthy discussion we held upon the evidence that such an adoption was in accordance with a well established practice prevailing amongst the Jain community. In our judgment in that case we dealt with the origin of the Jain sect and pointed out how, unlike the Hindus proper, the Jains attached no religious significance whatever to adoption and rejected the restrictions in the way of adoption imposed by the Brahmanical priests. We shall treat the historical portion of our judgment in that case as incorporated in this judgment, and thus avoid a repetition of matters which are really not in dispute. Dr. *Tej Bahadur Sapru* on behalf of the plaintiff respondent contended that the onus was improperly laid upon his client of giving evidence in support of his allegation that Jambu Prasad had not been adopted, and that in any case, whether his contention in regard to this be right or wrong, an opportunity should now be given to him of making a *primâ facie* case, and that an issue as to the fact of the adoption should be referred for determination on the merits to the Court below.

As regards the legal point it appears to us that it is concluded by authority. The plaintiff, as we have said, asked the Court to

(1) (1907) I. L. R., 29 All., 495.

declare that Jambu Prasad never was adopted, and that if he was adopted his adoption was invalid. His suit was brought during the lifetime of Musammat Asharfi Kunwar, and consequently he could not and did not ask for possession of the property of Mitter Sen. It has been held that in a suit brought by the heir of a deceased Hindu for the recovery of his property against a person claiming to be the adopted son of the deceased, upon proof or admission of the heirship of the plaintiff by natural relationship, the onus lies upon the defendant to prove his adoption—*Tarinee Churn Chowdhry* v. *Sharoda Soonduree Dossee* (1), *Chowdhry Pudum Singh* v. *Koer Oddey Singh* (2), *Gooroo Prosunno Singh* v. *Nil Madhub Singh* (3) and *Har Dyal Nag* v. *Roy Krishto Bhoomick* (4). In the last mentioned case a distinction is drawn between a suit in which possession is sought and a suit in which only a declaratory decree is prayed for, and we think that such a distinction ought not to be ignored. In the case of *Brojo Kishoree Dassee* v. *Sreenath Bose* (5) in which the plaintiff sued as reversionary heir during the lifetime of the widow of his deceased ancestor for a declaration that an adoption was invalid, it was held that the onus lay on him to prove the invalidity. In delivering the judgment of the Court, Sir Barnes Peacock, C.J., observed:—"The plaintiff asked in this regular suit to have it declared that Radha Nath's adoption is invalid: it appears to us that the onus rested upon him, as it does upon any one who asks for a decree declaring the illegitimacy of another person to prove the illegitimacy. The person who asks the Court to declare that a thing is invalid is bound to prove that it is so." This ruling was followed by a Bench of this Court in the case of *Sardar Singh* v. *Ram Kunwar* (6). We know of no ruling to the contrary. The principle upon which the onus is fixed resembles that according to which a plaintiff who sues to set aside deeds is not merely bound to prove his heirship, but must give some evidence to impeach the deeds before he can throw the onus of showing a better title on the defendant: see *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (7). In view of the

(1) (1869) 11 W. R., 468.
(2) (1869) 12 W. R., P. C. R., 1.
(3) (1873) 21 W. R., 84.
(4) (1875) 24 W. R., 107.
(5) (1868) 9 W. R., 463.
(6) Weekly Notes, 1902, p. 62.
(7) (1874) L. R., 1 I. A., 206.

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authorities we must hold that the Court below rightly decided the issue in regard to the fact of adoption in favour of the defendant Jambu Prasad.

We are unable to accede to the application made on behalf of the plaintiff that the issue as to adoption should be re-tried and an opportunity given to the plaintiff of adducing evidence on that issue. The plaintiff's case was that the adoption did not take place, and he ought to have been prepared to give some *primâ facie* evidence at least in support of it. He could not say that he was in any way taken by surprise. The case was heard at great length. We are told that four weeks were occupied in the examination of witnesses. Some evidence was given by the defendant in proof of the *factum* of his adoption, and, as we have already said, the plaintiff admitted that he had knowledge of it. One of the witnesses for the defendant, Dhumi Chand, deposed to the adoption and stated that he himself attended the adoption ceremony. Sham Lal, another witness, also deposed that he was present at the adoption ceremony. The fact of the adoption indeed was not seriously disputed. When the Court held that the onus lay upon the plaintiff to give evidence, it was open to him then to produce his witnesses; but he refused to do so, and it would be unreasonable, we think, now to re-agitate the question. It is undesirable to send back the case to be re-tried on this issue.

The next point raised on behalf of the plaintiff was that Musammat Asharfi Kunwar could not adopt a son without the consent of her co-widow Musammat Rikhi Kunwar. One answer to this is that there is no evidence that Rikhi Kunwar did not give her consent to the adoption. But there is a further answer, namely, that according to Hindu Law a senior widow can adopt a boy without the consent of her co-widow. This is not disputed, but with strange inconsistency it is said that Hindu Law does not in all matters apply to the Jains, and that, inasmuch as both the widows inherited jointly the property of their husband, it would be inequitable to permit one widow to deprive her co-widow of her interest without her consent. But it has been held that the ordinary Hindu Law of inheritance is applicable to Jains in the absence of proof of special customs and

usages varying that law—*Chotay Lall* v. *Chunno Lall* (1) and the same rule has been applied to matters of adoption, although the reasoning on which the law is based is not wholly applicable to the Jains as no spiritual efficacy attaches in their case to adoption. See *Amava* v. *Mahadgauda* (2). In that case it was held that where the son of the owner of an estate died childless in his father's lifetime, leaving two widows, and after the father's death without leaving a widow or descendants the two widows of his son inherited his estate as his nearest *sapindas*, an adoption by the senior widow was valid, though the younger widow did not consent to it, and although the adoption divested the estate which she had inherited from her father-in-law. This case is instructive, but it must not be overlooked that the Mayukha school of law, and not the Mitakshara, prevails in Bombay. No attempt, however, has been made to prove any custom amongst the Jains at variance with the ordinary Hindu law upon this point, and, this being so, we must reject the argument which has been addressed to us by Dr. *Tej Bahadur Sapru*.

The next point raised by him was that Sona Kunwar, the natural mother of Jambu Prasad, could not give her son in adoption without the authority of her deceased husband. If the husband had been alive, it is not disputed that his wife could not have given his son in adoption but the husband being dead there appears to be no objection to the giving in adoption of his son by his widow. In the connected appeals of *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (3) and *Radha Mohan* v. *Hardai Bibi* (4) it was held by their Lordships of the Privy Council on a question of adoption peculiar to the appeal from Madras that the authority of a widow in reference to adoption, not being identical in different schools of Hindu Law, it is established in Madras in regard to the giving of a boy in adoption by the widowed mother, that, unless there has been some express prohibition by the husband, the wife's power, with the concurrence of *sapindas*, where that is required, is co-extensive with the power of the husband and that the adoption of an only son is not an act so improper, but that a widow

(1) (1878) L. R., 6 I. A., 15.
(2) (1896) I. L. R., 22 Bom., 416.
(3) (1899) I. L. R., 22 Mad., 398.
(4) (1899) I. L. R., 21 All., 460.

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has power to effect it with the assent of the *sapindas* in the absence of express power from her husband. The appeal from the Allahabad High Court was from a decision of a Full Bench holding that according to the Benares school of Hindu Law the giving in adoption of an only son is sinful and to that extent contrary to the Hindu Law, but that the adoption of such a son having taken place in fact was not null and void. Dealing with this appeal, their Lordships rejected the fundamental position taken up by Mitter, J. in *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (1) namely, that "the institution of adoption as it exists among the Hindus is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion, and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable." They held that the doctrine thus propounded by Mitter, J. was "equally opposed to reasonable construction of the books, apart from religion, and to decided cases," and after an elaborate treatment of the law upheld the decision of this Court. We decide this question against the respondent.

Of the minor questions raised on behalf of the respondent, the last is that the Court ought to have determined the issue sought to be raised by the plaintiffs in their application of May 1905, namely, whether on the day and at the time of the adoption of Jambu Prasad any other adoption was made by the second wife of Mitter Sen, and if so, what is its effect. The answer to this is that it was not the case of the plaintiff that Rikhi Kunwar adopted any boy. On the contrary in his plaint he denied that any adoption by Rikhi Kunwar ever took place. In their written statement the defendants also denied that Rikhi Kunwar had made any adoption. The parties therefore were agreed as to this, and consequently there was no necessity to add the issues which the plaintiff sought to raise.

This brings us to the main question in the appeal, namely, whether or not amongst the Jains marriage is a bar to adoption. As we pointed out in the case of *Manohar Lal* v. *Banarsi Das* (2), the members of the Jain community are mostly engaged as

(1) (1868) 1 L. L. R., 221. (2) (1907) I. L. R., 29 All., 495.

traders and shop-keepers, and therefore we cannot expect to find records of adoptions such as are met with in the case of land-owners; proof by instances is the class of proof which ordinarily could be adduced to establish the practice of the community in regard to adoption.

We also pointed out that admittedly Jains can adopt a boy at any age, provided that he be not married, the ceremonies of tonsure and investiture with the sacred thread not being observed by them. We further pointed out that the contention advanced against the alleged practice is not that the custom amongst the Jains in regard to adoption is similar to that recognized by the Hindus of the twice born classes, but is similar to that which is binding amongst the *sudras*. In that case we held that 23 cases of adoption of married boys were proved, namely, 9 in Muzaffarnagar, 7 in Saharanpur, 3 in Delhi and 4 in Meerut, and in view of the fact that the Jain population was not large and was scattered about, we held that the number of cases proved was sufficient evidence of the legality of these adoptions. In addition to the former illustrations of the practice so proved, the defendant Jambu Prasad in this case adduced evidence in proof of the adoption of a number of other married boys, including Udai Ram, Kabul Singh and Pargash Chand in the Saharanpur district; Tilok Chand in the Muzaffarnagar district; Anup Singh, Murari Lal, Piarey Lal, Chanchal Rai, Kanhaia Lal and Sugan Chand in the Meerut district; Summan Lal and Juggi Mal in the Delhi district, and Makhan Lal in the Karnal district, as also six other instances which have not been pressed. In addition to this evidence was given on commission to prove the adoption of married boys in the Jaipur State, which borders on the Agra district. In the present case 19 of the instances which were proved to our satisfaction in the former case were also relied on, in addition to those mentioned above. As the parties to this litigation are different from the parties to the former case, we have been obliged to consider the evidence adduced in support of each alleged case of adoption, including the instances proved in the former appeal, and also the rebutting evidence, and the criticisms of the Court below upon that evidence. As to six of the instances which were not pressed, the evidence is not satisfactory, and we put them out

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of consideration. These are the cases of Behari Lal, Kanhaia Lal, Khub Chand, Radha Mal, Ishq Lal and Khushdil Prasad.

We shall first deal with the Saharanpur cases. The first case is that of Sikri Prasad, who is said to have been adopted by Mitthan Lal. One Ganga Ram, a Soraogi Agarwala Jain, deposed that amongst the Jains married as well as unmarried boys were taken in adoption; that Sikri Prasad was taken in adoption by Mitthan Lal from his natural father Murli Dhar, and that at the time of his adoption he was married, and that he (the witness) attended the adoption ceremony. He stated that Sikri Prasad was twice married, his first marriage being with a member of the family of Lala Dhum Singh and his second marriage with a daughter of Nihal Chand. He stated that he did not know if any boys other than Sikri Prasad, Jambu Prasad and Dip Chand were taken in adoption after marriage.

Another witness, Shankar Lal, of the same caste, a shopkeeper at Saharanpur, stated that he was a *chaudhri* of the Agarwala Jains and had been such for 10 or 15 years; that amongst the Jains a married boy can be taken in adoption, and that there was no restriction as to age. Then he stated that Sikri Prasad was taken in adoption by Mitthan Lal. In cross-examination he stated that Sikri Prasad was 13 or 14 years of age at the time of his adoption; that a man brought a message to his brother that Sikri Prasad was about to be adopted that day and that he should attend the ceremony, and that he (the witness) and his brother Buland Roy went to the ceremony and so he had knowledge of the adoption. He was unable to say whether Mitthan Lal's wife was alive at the time of the adoption which took place 18 or 19 years ago. The witness further stated that he attended the first marriage of Sikri Prasad which took place about 22 years ago.

Another witness, Lachman Das, also a shop-keeper, deposed that, according to custom amongst the Jains, a married as well as an unmarried boy may be taken in adoption, and he gave as illustrations the cases of Kabul Chand, Sikri Prasad, Jambu Prasad, Dip Chand and Udai Mal. Sikri Prasad, he said, was twice married, his second wife being the witness' own niece (daughter of his brother). Udai Mal, he said, was 18 at the time

of his adoption, and at the time of his marriage to the witness' niece was 26 or 28 years of age. He mentioned the name of the natural father of Udai Mal, namely, Ramanand.

Another witness, Dhumi Chand, deposed to the adoption of Sikri Prasad. He is a zamindar paying Rs. 700 or Rs. 725 as Government revenue. He stated that among the Jains married as well as unmarried boys were taken in adoption and that he had knowledge of this custom from the fact that Sikri Prasad, Lala Jambu Das (that is Jambu Prasad) Dip Chand and one Pargash Chand had been taken in adoption (that is, after marriage).

The rebutting evidence in this case is that of Govind Rai, a kanungo, residing at Kalpahar in Saharanpur. He admitted that Sikri Prasad "was kept by his paternal uncle (*i.e.*, Mitthan Lal)," but said that the ceremony of adoption was not performed. In cross-examination this witness stated that Sikri Prasad was first married to Lala Dhum Singh's daughter 25 or 26 years ago and that he attended the marriage ceremony, and that he was married a second time in the family of Baherawallas about 8 or 10 years ago. He also said that Mitthan Lal kept Sikri Prasad from the age of 6 years.

Molar Mal makes the bald statement that Sikri Mal was not adopted by any one, and Ram Prasad makes a similar statement. The last witness admitted in cross-examination that Sikri Prasad was married twice, the first marriage having taken place 20 or 25 years ago and the second marriage 11 or 12 years ago, and that both the marriages were celebrated by Murli Dhar, his natural father. He admitted that Sikri Prasad for the past 7 or 8 years had been living with Mitthan Lal and assigned as the reason for this that there was some dispute in Murli Dhar's house.

On this evidence we have no hesitation in coming to the conclusion that Sikri Prasad was adopted by his uncle Mitthan Lal when he was a married boy. The learned Subordinate Judge rejects the evidence given in support of the adoption, pointing out discrepancies in the dates assigned by the witnesses to the adoption and the marriage of Sikri Prasad. He says that "all the witnesses examined to prove this instance are men of no position," and held that the adoption was not proved, despite the fact that

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no evidence of any value was given to rebut the evidence adduced in support of it.

We do not agree with the learned Subordinate Judge that the witnesses who deposed to the adoption are men of no position. One is a cloth merchant and two others are shop-keepers, one of these, Shankar Lal, being a chief man in his district and the other being connected with Sikri Prasad through the marriage of his niece. The other witness is a well-to-do zamindar. We attach no importance to the discrepancy pointed out in the matter of dates. It is not to be expected that witnesses will remember with accuracy such matters. The criticism of the evidence by the learned Subordinate Judge in this case not unfairly represents the way in which he dealt throughout in his judgment with the evidence given in support of instances of the adoption of married boys. We do not propose to deal *seriatim* with the evidence given in support of the instances which were established to our satisfaction in the case of *Manohar Lal* v. *Banarsi Das*, but we shall refer to a few only of these instances.

Ajit Prasad, who was the natural son of one Sagun Chand, deposed to his adoption by Gurdial Singh 5 years ago. He stated that he was married 15 years ago, and that at the date of his adoption he was 25 years of age. At the time of his adoption, he said, the members of the brotherhood assembled and *laddus* were distributed, and his mother taking hold of his hand put it into the hand of Gurdial Singh.

A witness Bhagwan Das, a resident of Sarsawa, a zamindar and thekadar, deposed that among the Jains married as well as unmarried boys were taken in adoption, and that in his presence 5 or 6 married boys were adopted, namely, Ajit, *i.e.* Ajit Prasad, and Janki at Sarsawa; Parkash Chand at Nakur; Udai Ram, Jambu Prasad and Dip Chand at Saharanpur. Ajit Prasad's natural father, he said, died 7 or 8 years before his adoption by his uncle Gurdial Singh, and after his death Ajit lived with his mother at Bhuria.

Another Bhagwan Das, a resident of Sarsawa, and son of Bahadur Singh, also deposed to the alleged custom, and stated that at Sarsawa married boys, namely, Janki Das and Ajit Prasad,

had been taken in adoption. Sarsawa is in the district of Saharanpur.

The evidence of these witnesses was not contradicted. and we see no reason why credit should not be given to it.

The adoption of Janki Das, a married man, by Chajju Mal's widow is proved by the unrebutted evidence of the two persons of the name of Bhagwan Das to whom we have already referred, both deposing that they were present at the adoption. The learned Subordinate Judge rejected the evidence of these witnesses as untruthful, but we see no reason for distrusting it. An adoption is a matter of such notoriety amongst caste fellows and others living in the neighbourhood of the parties, that it is highly improbable that witnesses would come forward and depose to an adoption which had never taken place.

Another instance is that of Banwari Lal, the natural son of Lala Nagar Mal, who is said to have been adopted by Lala Bansi Lal, the brother of Nagar Mal. This adoption is proved by Jai Dayal and Yad Ram. Jai Dayal Mal is a zamindar and money-lender of the age of 70 years, paying Rs. 2,500 a year revenue and Rs. 35 income tax. He deposed that he built a Jain temple at Muzaffarnagar, and that among the Agarwala Jains a married as well as an unmarried boy is taken in adoption, and that he was aware of this from the fact that such adoptions had taken place in his time, and that of others before his time he had heard from his elders. He then mentioned two instances which had taken place within his memory at Muzaffarnagar, one being that of Banwari Lal and the other of Tilok Chand. Banwari Lal was adopted, he said, by Bansi Lal, who was the son of the witness' paternal uncle Bahadur Singh. Then he stated that Banwari Lal was married thrice, his first marriage having taken place about 50 years ago, the second about 34 years ago and the third about 17 years ago. Bansi Lal carried on a money-lending business and had property besides, and upon his death Banwari Lal, he said, took possession of it, while the estate of Nagar Mal was taken possession of by his other son Dasaundhi Ram. Then he referred to the adoption of Tilok Chand by Khairati Ram, whose daughter had been married to Tilok Chand before the adoption, and said that he (the witness) was present when the members of the

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brotherhood assembled on the occasion of the adoption of Banwari Lal, and that he also joined the marriage procession and was present at the marriage of Banwari Lal. This witness is a man of position and one to whose evidence weight should be attached. He is corroborated by Yad Ram, who deposed to the adoptions of three married men, namely, Ishq Lal, Banwari Lal and Tilok Chand, and stated that Banwari Lal was adopted at the age of 22 or 24 by Bansi Lal, that Tilok Chand was adopted by Khairati Ram at the age of 26 or 27 years, and that he knew both the adoptive fathers, being on social terms with them and visiting them on occasions of marriages. He came to know of the adoptions of Banwari Lal and Tilok Chand from Banwari Lal as well as from the members of his family, and he attended the first marriage of Tilok Chand. In cross-examination he stated that he attended the second marriage of Banwari Lal to a member of a family residing at Salawah, and that that marriage was celebrated by Bansi Lal, and that Nagar Mal and all his brothers joined the marriage procession at the time of his second marriage.

The only rebutting evidence given in this case is that of Khairati Ram. He is a brother of the plaintiff's general attorney. In his direct examination he stated that Banwari Lal's first marriage took place 35 or 36 years ago and that he attended that marriage, but upon cross-examination he was unable to state in whose family Banwari Lal was married.

The learned Subordinate Judge disbelieved the evidence of Jai Dayal Mal stating that he was a tutored witness, and he did not believe the evidence of Yad Ram. He observed that a mere perusal of the evidence will show that Jai Dayal M al is a tutored witness. We cannot agree with the learned Subordinate Judge as to this. We can discover no sign of tutoring in his evidence. He appears to be a highly respectable member of the Jain community and a man of substance, and we see no reason why his evidence given with so much detail should be rejected.

We now pass on to the case of Juggi Mal, who is said to have been adopted by Mehr Chand. Mehr Chand is a contractor and banker and a man of position, being a Darbari of the Governor General since the year 1877. He is an Agarwala Jain, as are

all the witnesses who deposed to instances of adoption which have been established in evidence. He deposed that he built a Jain temple in Delhi and in 1879 had the *partishta* ceremony performed at the cost of 4 or 5 lakhs of rupees. He then stated that he adopted a son, namely, Juggi Mal, on 1st Magh Sudi, Sambat 1961, corresponding to 1904. Juggi Mal was in 1905 39 or 40 years of age, and his first marriage took place 23 or 24 years ago, and his second marriage was celebrated by the witness at a cost of Rs. 2,500. In cross-examination he stated that all the members of the Panchayat took part in Juggi Mal's marriage, but said that his cousin Chunni Lal wished to give his own son in adoption to the witness, but that he (the witness) did not wish to take him in adoption owing to his tender age and in consequence of this Chunni Lal dissociated himself from the Panchayat. He further stated that he consulted two or four men of his brotherhood before making the adoption and that they approved of it.

Sangam Lal also gave evidence as to this adoption, but there can be no controversy in the matter as it is one of public notoriety.

A witness for the plaintiff, Jauhari Mal, admitted that the adoption took place, but stated that the persons assembled regarded the act of taking a grown up and married boy with disfavour. This witness, who appears to be a respectable man, being a banker and treasurer of the National Bank of Upper India at Delhi, in answer to a question in cross-examination, stated that the members of the brotherhood objected to the adoption of Juggi Mal because he was of advanced age and the wife of Mehr Chand was younger than he and then he made this important admission that "there was no other objection." In the course of his evidence he also stated that he had heard that one Anup Singh was taken in adoption at Kotana, and a married boy was taken in adoption in the family of Gulab Singh Naha Singh at Meerut. It is remarkable that of the many cases of adoption of married boys of which evidence has been given in no single case has any proof been given that any caste penalty followed.

Piarey Lal, a witness for the plaintiff, stated that amongst the Agarwala Jains a married boy is not taken in adoption, but

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he admitted that Juggi Mal, a married boy, was taken in adoption by Mehr Chand. This witness is a pleader practising in Delhi. He admitted that he attended the *sagai* ceremony of Juggi Mal, so that he was not seriously offended by the fact of Juggi Mal's adoption.

Ishri Prasad, an Honorary Magistrate and also Government Treasurer at Delhi, deposed that, so far as he remembered, no married boy, except the boy adopted by Mehr Chand, was taken in adoption in Delhi. He stated his opinion that the adoption of a married boy or a grown up boy was not proper and said that he did not approve of it. He stated that the Panchayat of Delhi had not made any rule to the effect that a married boy should not be taken in adoption. It was proposed, he said, that a Panchayat should be held in connection with the adoption made by Mehr Chand, but that such had not been held as there was no leisure and the matter was not considered to be of great importance. It is clear from this evidence that the members of the brotherhood in Delhi did not regard the adoption of a married boy as obnoxious to any rule governing the Agarwala Jains, though they personally did not approve of the practice.

The learned Subordinate Judge treated this case as proved, but considered it a breach of the rules of caste or of law, and cited from a report this passage:—"Occasional breaches of general rules of caste or law do occur, but a few modern breaches of such a rule do not constitute an ancient and invariable custom." He treated this adoption as simply a case of the breach of the law or of usage.

We shall pass over the other instances which were established to our satisfaction in the case of *Manohar Lal* v. *Banarsi Das* with this observation that we have carefully considered the evidence which has been laid before us and the criticisms passed upon it and we see no reason for coming to a different conclusion from that at which we arrived on the evidence furnished in that case.

Evidence in proof of 13 additional instances has been laid before us in this appeal, not including evidence of adoptions of married boys in the Jaipur State, namely, two in the Saharanpur district, one in the Muzaffarnagar district, 6 in the Meerut district,

2 in the Delhi district and one in the Karnal district. The first is that of Udai Ram, said to have been adopted by Banwari Lal. Lachman Das, to portion of whose evidence we have already referred, said that he was aware of the adoption of married boys and gave as an instance the case of Udai Mal and others. Udai Mal (also called Udai Ram), he stated, was taken in adoption by Banwari Lal at the age of 18 and lives near the witness' house in Mohalla Yadgar in Saharanpur. The name of his natural father was Ramanand, who was brother of Banwari Lal. Ramanand, he stated, left 3 sons, the eldest being Ajudhia Prasad, the second Chhamman Lal and the third Udai Mal. Udai Mal was taken in adoption, he stated, perhaps 12 or 13 years ago and was married 20 years ago after the death of Ramanand.

Bhagwan Das, to whose evidence we have also referred, deposed that married as well as unmarried boys were taken in adoption, and mentioned the adoption of two such boys at Sarsawa, and then stated that two other married boys had also been taken in adoption, namely, Udai Ram who was taken in adoption by Banwari Lal, and the other Pargash Chand, who was taken in adoption by Kishori Lal. In cross-examination he gave the name of Ramanand as the natural father of Udai Ram, and stated that Udai Ram was taken in adoption 18 or 20 years ago.

Then we have the evidence of the other Bhagwan Das, the son of Govind Rai, who mentioned the name of Udai Ram as one of a number of married boys who were taken in adoption at Saharanpur. Udai Ram, he said, was taken in adoption by Banwari Lal some 14 or 15 years ago. His partner, he said, was related to Banwari Lal. The only rebutting evidence is that of Morah Mal and Ram Prasad. The former deposed that "no one adopted Udai Mal in my presence." In cross-examination he said that he never attended any adoption ceremony at Saharanpur or outside of Saharanpur, and that Udai Mal was not a friend of his nor was he on visiting terms with him. Further, pressed as to how he knew that Udai Mal had not been adopted by anyone, he stated that he had heard that such was the case. He knew nothing of Udai Mal's

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age or of his marriage, and it is quite evident that he knows nothing whatever about him. His evidence is worthless. Ram Prasad's evidence is equally valueless. He deposed that Udai Mal was not adopted by anyone. On cross-examination as to how he knew this his answer was:—"Invitations are sent out when a ceremony takes place in the brotherhood. Hence I say that Udai Ram was not adopted." He admitted that he had no relationship with Ramanand the father of Udai Ram or with Banwari Lal. It is therefore unlikely that he would have received an invitation to the adoption ceremony. Although the evidence in support of this adoption is not strong, we see no reason for distrusting it. Bhagwan Das, the son of Gobind Rai, was actually present at the adoption, if his evidence be true. He is a man in a fairly good position of life, and we do not think that we ought to reject his testimony.

The next instance is that of Kabul Singh (also called Kabul Chand) said to have been adopted by the widow of one Raghu Mal. Shankar Lal, a Chaudhri of the Agarwala Jains in Saharanpur, who has already been mentioned, deposed to this adoption. He stated that he heard that Kabul Singh had been taken in adoption by Raghu Mal 20 or 21 years ago, and he was aware that Kabul Singh was during his life in possession of the property of Raghu Mal, and that his sons are now in possession of it. The importance of this evidence is that Kabul Singh, who was the natural son of Nanhu Mal, acquired the property of Raghu Mal on his death and remained in possession of it up to the time of his own death. If he had not been adopted by Raghu Mal, he would not have got his property. Lachman Das, who was related to Kabul Singh, the latter being a grandson of his aunt, deposed that Kabul Singh was adopted by the wife of the paternal uncle of Nanhu Mal, namely, Raghu Mal, and that his marriage was performed by Nanhu Mal, and that at the time of his adoption he was 28 or 30 years of age. The adoption, he said, took place about 20 or 21 years ago, and Kabul Singh had been married 27 or 28 years ago. This witness from his relationship would be certain to know of the adoption if it took place; and in view of the fact that the evidence in support of the adoption stands unrebutted, we see no reason why we should not accept it. The

only point which the plaintiff made against the adoption was that in the will of Raghu Mal, Kabul Chand is described as the son of Nanak Chand, his natural father, but there is nothing in this point, seeing that the will was executed before the date of the alleged adoption, namely, on the 27th of November 1883. Now we do not expect in a case where instances of adoptions are being proved that all possible evidence as to each adoption should be exhausted. If such were required, it would be beyond the means of litigants to establish their suits, so costly would be the prosecution of them. The evidence must be such, however as would ordinarily satisfy an unprejudiced mind beyond reasonable doubt that the adoptions alleged did take place.

Another instance is that of Parkash Chand, who is said to have been taken in adoption after marriage by the wife of Kishori Lal at Nakur. The two witnesses named Bhagwan Das deposed to this adoption, but neither of them appears to have attended the adoption ceremony. One of them says that he heard of the adoption at the Tahsil office at Nakur and also at the house of Daya Chand, three or four years before his examination; that there were some people congregated at the place who were speaking on the subject, and in answer to a question put by him stated that the wife of Kishori Lal had taken Parkash Chand in adoption and they said that he had already been married. The evidence of the other Bhagwan Das is also hearsay and of little value. Dhuni Chand, a zamindar residing at Saharanpur, deposed that Parkash Chand was taken in adoption about six years ago by the wife of Kishori Lal. Sangam Lal, a commission agent, resident of Ambetha, mentioned a number of adoptions of married boys, and amongst others that of Parkash Chand, with whom he was acquainted. The evidence in support of this adoption is weak, but the fact of the adoption is not denied. The only matter which is denied is that Parkash Chand had been married before his adoption. Gobind Rai, a witness for the plaintiff, deposed that he knew Parkash Chand, and that he was adopted by Kishori Lal, but that he was married after Kishori Lal's death and that his marriage was celebrated by Kishori Lal's widow. The adoption, he said, took place more than 7 years and 4 or 5 months ago. We think

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the weight of evidence establishes that Parkash Chand was adopted by the widow of Kishori Lal and not by Kishori Lal himself, and that his marriage took place before his adoption.

The next instance is that of Tilok Chand, who is said to have been adopted after marriage by Khairati Ram. Khairati Ram himself deposed to this adoption. He is a zamindar and money-lender, residing at Muzaffarnagar, and pays Rs. 700 or Rs. 800 annually as Government revenue and is the manager of a Panchayati temple and president of the panchayat at Hastinapur. He deposed that his daughter was married to Tilok Chand 14 years ago, and that he has since adopted him and celebrated his second marriage. The adoption took place, he said, two years ago, three or four months after the death of the witness' daughter. In cross-examination the witness stated that a deed of adoption was executed and was attested by Ram Sukh Das. Two witnesses, Jai Dayal Mal and Yad Ram, corroborated the evidence of this witness. To portion of Jai Dayal Mal's evidence we have already referred. As regards the adoption of Tilok Chand he stated that Tilok Chand was adopted by Khairati Ram and that before the adoption he had been married to Khairati Ram's daughter. The adoption took place, he said, a little less than two years ago. The witness was not present at the adoption, but merely heard of it from Khairati Ram, so that his evidence is not of much value. Yad Ram, who was acquainted with Khairati Ram and Tilok Chand and is on social terms with them, deposed that Tilok Chand was adopted by Khairati Ram at the age of 27 or 28 years, but he admitted that he only knew of this adoption from conversations with Banwari Lal as also with members of his family, but he attended the first marriage of Tilok Chand. He also had conversations with Tilok Chand about his adoption. The only rebutting evidence is that of Mitter Sen, who denied that Khairati Ram took any boy in adoption, but in cross-examination admitted that he had heard that Khairati Ram kept his son-in-law, though he did not perform any ceremony. The learned Subordinate Judge in dealing with the evidence of Jai Dayal Mal said that "he had not the courage to say that the adoption was made in his presence," that is, he had not the courage to tell a falsehood. The adoption did not take place in his presence and therefore

he did not assert that it did. He had, we might say, the courage to be truthful. The learned Subordinate Judge did not consider that this instance was satisfactorily proved, and assigns a number of reasons for the conclusion at which he arrived, but we are wholly unable to agree with him. We think that the evidence of Khairati Ram is truthful and it of itself is quite sufficient to prove the instance.

We now come to Anup Singh, who is said to have been adopted by the widow of one Murari Lal 9 years ago. Anup Singh, who is a zamindar and money-lender himself gave evidence and deposed that he was adopted by Musammat Chameli, the widow of Murari Lal, who was his own brother, 8 months after the death of Murari Lal. He said that he was first married at the age of 12 years and that his second marriage took place "after his adoption, about 9 years ago, when he was 25 years old." He gave as a reason for his second marriage that he had no issue by his first wife, who was still living, as was also his natural father Banarsi Das, who lived at Sampat in the district of Delhi. His father, he said, gave him in adoption. Then he said he was in possession of the zamindari property of Murari Lal as also of money in deposit and Government Promissory Notes of the value of about 3 lakhs of rupees; that he had an income of Rs. 8,000 a year from the property, and that he paid Rs. 150 per annum income tax on account of the estate of Murari Lal. After his adoption, he said, Sultan Singh and Umrao Singh brought a suit against him, disputing, we presume, his adoption, and this suit was compromised, he getting the entire property of Murari Lal, but giving Rs. 29,000 to Umrao Singh. This litigation arose in this way. Sheo Singh Rai, Ishq Lal and Dilpat Rai were three brothers. Sheo Singh adopted Nihal Singh and Sultan Singh and Multan Singh were Nihal Singh's sons. Ishq Lal adopted Murari Lal, the husband of Musammat Chameli, and Musammat Chameli adopted Anup Singh. Umrao Singh was the adopted son of Dalpat Rai.

If the adoption of Anup Singh was not valid, Umrao Singh as the heir of Murari Lal was entitled to his estate. The learned Subordinate Judge rejected the proof of adoption in this case on the ground that Anup Singh compromised the suit with Umrao Singh and gave him Rs. 29,000. But there does not appear

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to us to be much force in his criticism. In view of the fact that the estate in dispute was of the value of 3 lakhs, we think that Anup Singh possibly acted prudently in avoiding protracted litigation by the payment which he made to Umrao Singh of a sum equivalent to less than one-tenth of the value of the estate at stake, particularly too as Umrao Singh was, according to the Subordinate Judge, a man of no position. The important fact is that the validity of the adoption was accepted and that Anup Singh by virtue of it acquired the property of Murari Lal. Anup Singh further deposed that when he was adopted the members of the brotherhood assembled and *laddus* were distributed. His evidence is corroborated by that of Jugul Kishore and Shiam Lal.

Jugul Kishore stated that Anup Singh was taken in adoption by the wife of his brother Murari Lal when he was about 28 or 30 years old, and that this adoption took place in his presence and was publicly known. Shiam Lal deposed that he also was present at the adoption which took place in the village of Katana. No evidence was given to contradict these witnesses. The plaintiff's witness Jauhari Mal indeed supported them. He stated that he heard of the adoption of Anup Singh at Katana. In cross-examination this witness said that he had never been present at the adoption of a married boy, but in answer to the question :—"Is there any harm, if the boy taken in adoption belongs to the brotherhood and is younger than the adoptive father and the adoptive mother?" he replied :—"I did not see a married boy taken in adoption. Otherwise there is no harm in taking a young boy in adoption." This witness, as we have already pointed out, is a man in a good position, being a banker and treasurer of the National Bank of Upper India at Delhi. The evidence satisfies us beyond any doubt that Anup Singh was adopted after marriage.

The next instance is that of Murari Lal, who is said to have been adopted by the widow of one Nand Ram. His adoption is proved by Jugul Kishore. He deposed that amongst the Jain Agarwalas a married boy is taken in adoption, and as illustrations he referred to the adoptions of Anup Singh, Murari Lal and Mitthan Lal, all of whom were married before their adoptions. Murari Lal was taken in adoption, he said, at Baraut where he (Jugul Kishore) resides and the adoption took place in his

presence. Questioned as to how he came to know that Murari Lal was married, his answer was that when he was adopted his wife accompanied him. The only rebutting evidence in this case is that of Bhagwant Rai, who made the bald statement that Nand Lal's widow did not adopt anyone. In cross-examination he admitted that he had no friendship with Murari Lal, who was 23 or 24 years old, and he was unable to state how many times he was married. He also said that he must have been married, but he was not aware of the marriage, and that Nand Lal's wife did not appear before him. It is clear that this witness has no knowledge whatever of the family. We see no reason for rejecting the evidence of Jugul Kishore, as did the learned Subordinate Judge, on the ground that neither the natural father or adoptive mother of Murari Lal was examined, and that the evidence of Jugul Kishore was not reliable. Jugul Kishore is a man of substance, holding zamindari property and being also engaged in money dealings. He pays Rs. 136 odd income-tax and gets over a thousand rupees in annual profits from his zamindari. We see no reason for distrusting his evidence.

The adoption of Behari Lal by the widow of one Jawahir Lal, that of Kanhaiya Lal by Salig Ram's widow, and of Sujan Chand by Amir Chand are proved by the uncontradicted evidence of Shiam Lal, a resident of Meerut. He deposed that married as well as unmarried boys were adopted, and that the custom had been in vogue since the time of his ancestors, and that he had heard of it from them. He himself attended at the adoptions of 8 or 10 married boys, and amongst others the adoption of Behari Lal by the widow of Jawahir Lal, the adoptive mother, who belonged to witness' family, she being his paternal grandmother. He stated :—" In my family at Binauli my paternal grandmother, who was the wife of Jawahir Lal, adopted Behari Lal." And then he proceeded to say that in addition to this adoption the wife of Mohan Lal adopted Chanchal Rai in Mauza Haldwari and in the same Mauza the wife of Salig Ram adopted Kanhaiya Lal. Then he refers to several other similar adoptions, and amongst others to that of Sujan Chand in Baghpat by Amin Chand Seth. Sujan Chand's adoption, he said, took place a little more than 40 years ago. In cross-examination

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this witness stated that Sujan Chand was the nephew of Amin Chand. He also said that he (the witness) attended the marriage of, amongst others, Behari Lal, who was adopted after his marriage. Now adoptions are matters more or less of public notoriety, and we find it hard to believe that evidence such as that given by Shiam Lal was fabricated for the purposes of this case. He was cross-examined at very great length, but was in no respect shaken. The learned Subordinate Judge rejected the proof in these cases, as the evidence of Shiam Lal was not corroborated. As regards Behari Lal he pointed out that he got possession of his alleged adoptive mother's property after her death, and remarked that, as she inherited this property from her husband, Behari Lal, if he was adopted by her, ought to have at once got possession of it. As to this we may remark that, according to our experience, out of respect, if for no other reason, a son, whether he be an adopted son or a natural son, frequently permits the property of the deceased husband, his father, to be recorded in the name of and enjoyed by his widow for her life. We attach no importance therefore to the fact that Jawahir Lal's widow remained recorded as the owner, but we do attach importance to the fact that Behari Lal is now in possession of the property, to which he could have no claim unless as an adopted son.

We now come to the case of Samman Lal, who is said to have been adopted after marriage by Sukhanand. This instance is proved by Samman Lal himself. He is a shopkeeper at Delhi. He deposed that he was adopted by Sukhanand about 25 or 26 years ago after his marriage, which took place 30 years ago. His real father Patar Chand, he said, celebrated his marriage. In cross-examination he stated that Patar Chand and Sukhanand were brothers, that Patar Chand died 2 years ago, while Sukhanand died 13 years ago. His natural mother was, he said, still living. Sukhanand and Patar Chand were separate in business and their property was separate. The evidence of this witness is uncontradicted and we see no reason for distrusting it.

The next instance is that of Makhan Lal, who is said to have been adopted by Mangal Sen. The only evidence

in support of this adoption is that of Makhan Lal himself, but his evidence is also uncontradicted. Makhan Lal is a road contractor. He is upwards of 50 years of age. He stated that his natural father's name was Chhatar Mal and that he is the adopted son of Mangal Sen. He was adopted, he said, 30 years ago when a married man, his marriage having taken place 40 years ago. In cross-examination he stated that his first son was born before his adoption and his second son was alive and was 24 years of age at the time of his examination. We have in addition to these instances the adoption of Mul Chand by Musammat Kishen Dei, the widow of one Ganesh Lal, which was proved to our satisfaction in the case of *Manohar Lal* v. *Banarsi Das.*

These exhaust the instances which have been relied on in addition to those proved in the case of *Manohar Lal* v. *Banarsi Das.* We have only now to deal with a few cases coming from the Jaipur State.

It would appear from the judgment that the pleader for the defendant in argument placed no reliance on these cases, but the evidence was relied on for the appellant before us, and was read to us, and we think that it has some value as showing that the Agarwala Jains in the Jaipur State, which borders upon the Agra district, adopt married men. Bachu Lalji described himself as the adopted son of Lala Ram Chanderji of Jaipur State. His natural father's name was Dhannua Lal. He deposed that married boys belonging to the family were adopted amongst the Agarwala Jains, and that there was no age-limit. He stated that the tying of a turban on the head of the person who is to be adopted was equivalent to an adoption. He himself was 30 years old and a married man when the turban was tied on his head in token of his adoption.

Another Lala Bachu Lalji, the adopted son of Lala Debi Lalji of the same State, also deposed to the practice of adoption amongst the Jains. He stated that his natural father's name was Sheobakhsh; that Debi Lalji by whom he was adopted was Manay Ram's son; that in his family married boys were adopted. Lala Lalji Mal also deposed that married boys were adopted amongst the Jains, and that he was adopted by Mangal Lalji after his marriage, as were also two persons of the name of Basanti Lal

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and Gopi Lal. Lala Kishori Chandji deposed that Jain Agarwalas and Bishnus both adopted married and unmarried boys, and there was no limit to age. He himself was adopted by Lala Chhote Lalji. He stated that Bachu Lal, Chait Mal and Baijnath Chaudhri were adopted after marriage; that Bachu Lal was adopted when he was 25 years old, Chait Mal when he was 30 years old and Baijnath when he was 45 years old. The witness attended, he said, the adoption ceremony of Baijnath. Another witness, Lala Sobha Lalji, deposed to the same practice, and stated that he himself was adopted after his marriage by his paternal uncle Govind Ram and that he became the owner of Govind Ram's property. He also deposed to the adoptions of Bachu Lal by Debi Lal and Makhan Mal by Narsingh Lal after their marriages. The ritual of adoption amongst these Jaipur Jains is unlike that which prevails amongst the Jains in this Province. According to the evidence of these witnesses it consists of the tying of a turban on the head of the adopted boy. The fact, however, that amongst Agarwala Jains in the Jaipur State marriage is no bar to adoption is suggestive as showing that amongst them the restrictions imposed by the Brahmanical priests and prevailing amongst Hindus proper are not regarded as binding upon that branch of the Jain community.

Not including the Jaipur instances, we have thus established to our satisfaction upwards of 30 instances of the adoption of married boys amongst the Jains in the Saharanpur, Muzaffarnagar, Meerut, Delhi and Karnal districts. The evidence given in support of 16 of these instances is unrebutted, in 13 instances the adopted sons themselves gave evidence in proof of their adoption and showed that they had got the property of their adoptive fathers. In five instances either the adoptive or the natural father gave evidence in support of the adoption.

The proof in some instances is stronger than in others—but we think that in all, with the exception of those which we have rejected as not satisfactorily proved, it is sufficient to satisfy an unprejudiced mind beyond reasonable doubt.

The number of instances so proved is remarkable in view of the smallness of the Jain population in this Province. Ordinarily unmarried boys would be selected for adoption, the choice of

a married boy being the exception. We pointed out in *Manohar Lal* v. *Banarsi Das* that there is no restriction in the matter of age to be found in Manu or the Smritis, and that the adoption of a married man of whatever age is not forbidden by the Mitakshara, and that there is no religious significance attached by the Jains to adoption. It is not the case of the plaintiff respondent that the rules of orthodox Hindus in the matter of adoption are applicable to the Jains. This case could not be set up, seeing that the ceremonies of investiture with the sacred thread and of tonsure are unknown to the Jains, and that adoptions with the Jains are purely secular matters, while with the Hindus proper they have a religious significance. As we have pointed out, their Lordships of the Privy Council exposed the infirmity of the fundamental proposition laid down by Mr. Justice Mitter that the institution of adoption was an essentially religious institution. We have shown that in several respects the practice prevailing amongst the Jains as regards adoption materially differs from that of Hindus proper. For example, it has been held that amongst them a widow is competent to adopt without the sanction of her husband—*Maharaja Govind Nath Ray* v. *Gulab Chand* (1). In *Sheo Singh Rai* v. *Dakho* (2) it was held that a sonless widow can adopt a son without the authority of her husband. In *Lakhmi Chand* v. *Gatto Bai* (3) the authority of a Jain widow to make a second adoption on the death of the child first adopted was established. Again, it has been held that a Jain widow may adopt a daughter's son. In Bombay indeed it was held that according to the Hindu Law in force in that presidency the adoption of a married asagothra Brahman was not prohibited—*Dharma Dagu* v. *Ram Krishna Chimnaji* (4). It is only when we come to comparatively modern works, such as the Dattika Mimansa and Dattika Chandrika, that we find restrictions imposed on adoption. These restrictions were undoubtedly the work of the Brahmanical priests of later times. Their Lordships of the Privy Council in the case of *Radha Mohan* v. *Hardai Bibi*, to which we have already referred, pointing to the antiquity of the Smritis as compared with the

(1) (1833) 5 S. D. A., 276.
(2) (1878) I. L. R., 1 All., 688.
(3) (1886) I. L. R., 8 All., 319.
(4) (1885) I. L. R., 10 Bom., 80.

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Dattika Mimansa and Dattika Chandrika observe that they "had occasion in a late case to dwell upon the mixture of morality religion and law in the Smritis—*Rao Balwant Singh* v. *Rani Kishori* (1). They had to decide whether a prohibition or alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing." They then said:—"All these old text books and commentaries are apt to mingle religious and moral considerations not being positive laws with rules intended for positive laws. In the preface to his valuable work on Hindu law Sir William Macnaghten says:—'It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible.' They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society and impart to it an inflexible rigidity never contemplated by the original law-givers.' This is weighty and suggestive language. Again, treating of the weight to be attached to the Dattika Mimansa and Dattika Chandrika, their Lordships at page 474, referring to the view expressed by Knox, J., that the authority of these works was open to examination, explanation, criticism, et cetera, while not accepting this view, observe that "so far as showing that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge." Now in view of the fact that the Jains dissented from Hinduism more than 2½ centuries ago, at a time when, so far as the authorities go, no trace of the restriction of marriage existed in the matter of adoption, and seeing that in primitive times the practice of adoption had no

(1) (1898) L. R., 25 I. A., 54, at p. 69.

religious basis; also in view of the fact, which is admitted, that the practice of adoption amongst the Jains is necessarily unlike that observed amongst the Brahmans and Vaishiyas, as we have already pointed out, it might be thought that the onus of proving the existence of a restriction upon adoption in the case of the Jains such as prevails amongst Hindus proper lay upon the party making this assertion. In view, however, of the ruling of their Lordships of the Privy Council that in Jain cases it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation, we have treated this burden as one which lay upon the defendant appellant. This onus he has, in our judgment, satisfied, and we remain of the opinion which we expressed in *Manohar Lal* v. *Banarsi Das* that the marriage of a Jain is no bar to his adoption.

We therefore allow the appeal. We set aside the decree of the Court below and give a declaration that Jambu Prasad was adopted by Musammat Asharfi Kunwar and that his adoption is valid, and we dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

1908
March 11.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

RAM DIN (DEFENDANT) *v.* BHUP SINGH AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 43—*Usufructuary mortgage—Suit for redemption—Subsequent suit to recover surplus profits—Act No. XV of* 1877 (*Indian Limitation Act*), *Schedule II, Article* 105—*Act No. IV of* 1882 (*Transfer of Property Act*), *section* 92.

In a suit for redemption of a usufructuary mortgage the mortgagor is bound to claim for surplus profits, if any, payable by the mortgagee. Section 43 of the Code of Civil Procedure is a bar to the recovery of such profits by means of a separate suit.

Article 105 of the second schedule to the Indian Limitation Act, 1877, applies to a case where the mortgagor gets possession otherwise than by means of a suit for redemption.

Vinayak Shivrao Dighe v. *Dattatraya Gopal* (1), *Rukhminibai* v. *Venkatesh* (2), *Satyabadi Behara* v. *Harabati* (3), *Kashi* v. *Bajrang Prasad* (4) and *Baloji Tamaji Pothar* v. *Tamangouda* (5) referred to.

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* First Appeal No. 30 of 1907, from an order of C. D. Steel, District Judge of Shahjahanpur, dated the 5th of January 1907.

(1) (1902) I. L. R., 26 Bom., 661.
(2) (1907) I. L. R., 31 Bom., 527.
(3) (1907) I. L. R., 34 Calc., 223.
(4) (1907) I. L. R., 30 All., 36.
(5) (1869) 6 Bom., H. C. Rep., A. C. J., 97.

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THE facts of this case are as follows :—

The plaintiffs were usufructuary mortgagors. They brought a suit for redemption on the ground that the mortgage debt had been satisfied from the profits of the property mortgaged, but in that suit they did not claim any surplus profits. They obtained a decree for redemption on the 13th of May 1906, without payment, on the finding that the mortgage had been satisfied as alleged in 1280 Fasli, and in execution of that decree they got possession of the mortgaged property.

Thereafter the suit out of which this appeal arose was brought by the plaintiffs mortgagors to recover excess profits realized by the defendant after the satisfaction of the mortgage debt and before redemption. The Court of first instance (Subordinate Judge of Shahjahanpur) dismissed the suit, holding that it was barred by the provisions of section 43 of the Code of Civil Procedure. On appeal by the plaintiffs the District Judge held that section 43 was no bar to the suit, and remanded the case under section 562 for trial on the merits. From this order the defendant appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviya*, for the respondents.

AIKMAN, J.—This is an appeal from an order of the learned District Judge of Shahjahanpur remanding a case under the provisions of section 562 of the Code of Civil Procedure.

The plaintiffs, who are respondents here, brought a suit against the appellant in a Munsif's Court for redemption of a usufructuary mortgage. They obtained a decree and were put in possession of the mortgaged property on the 13th of March 1906. They subsequently brought the suit out of which this appeal arises to recover from the appellant Rs. 5,000 on account of surplus collections alleged to have been received since 1874, when the mortgage debt was discharged by the usufruct of the property. The suit was filed in the Court of the Subordinate Judge. It was dismissed by him on the ground that it was barred by the provisions of section 43 of the Code of Civil Procedure. On appeal by the plaintiffs the learned District Judge held that the suit was not barred and remanded it for decision on the merits. It is against

that order of remand that the defendant has preferred this appeal.

In my opinion the appeal must be allowed. The learned District Judge has written a careful judgment, but I cannot agree with the conclusion at which he has arrived. He says:—"The cause of action on the 17th of December 1904, the date of the institution of the case in the Munsif's court, was the retention of the property. The whole claim which the plaintiff was entitled to make then on that cause of action was to say:—'Give me possession of the property'." This is a view which I cannot accept.

The plaintiff had another remedy, which he was not only entitled to sue for but bound to sue for in the previous suit, and that was to have an account taken and a decree passed for any surplus received by the mortgagee after discharge of the mortgage debt. As remarked by Jenkins, C. J., in *Vinayak* v. *Dattatraya* (1), "a redemption suit has for its purpose the complete adjustment of the rights of the parties, and the decree when properly framed provides for matters even up to the time when it is ultimately carried into effect."

The decisions in *Rukhminibai* v. *Venkatesh* (2), *Satyabadi Behara* v. *Harabati* (3) and *Kashi* v. *Bajrang Prasad* (4) are also in favour of the appellant, and we have not been referred to any case in which a suit like the present has been held to be maintainable. In the case of *Rukminibai* v. *Venkatesh* (2) the subsequent suit of the mortgagee was held to be barred either under section 13 or section 43 of the Code of Civil Procedure. Section 13 will not apply to this case, as the Court which tried the previous suit was not a Court competent to try the present suit; but the provisions of section 43 are sufficient to bar this suit.

The learned District Judge in support of the conclusion to which he came relies on article 105 of the second schedule of the Limitation Act, which prescribes a period of limitation for a suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee, and gives as the time from which the period begins to run the date when the mortgagor re-enters on the mortgaged property. In my opinion

(1) (1902) I. L. R., 26 Bom., 661.
(2) (1907) I. L. R., 31 Bom., 527.
(3) (1907) I. L. R., 34 Calc., 223.
(4) (1907) I. L. R., 30 All., 36.

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this article must not be construed so as to conflict with the provisions of section 43 of the Code of Civil Procedure, and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by means of a suit for redemption.

For the above reasons I would allow the appeal with costs.

KARAMAT HUSEIN, J.—The facts which led up to this appeal are that a suit for redemption (No. 591 of 1904) was brought in the Court of the Munsif of Shahjahanpur. The plaintiffs in that suit did not claim any surplus collections made by the mortgagee in possession, nor did they obtain any permission to bring a separate suit for such collections. They got possession of the property in execution of the decree for redemption on the 13th March 1906, without any payment, as it was found that the mortgage debt had been satisfied from the profits of the mortgaged property before 1280 Fasli. On the 1st of May 1906, the plaintiffs brought a suit for the recovery of the excess profits realized by the defendant after the satisfaction of the mortgage money and before redemption. One of the pleas in defence was that section 43 of the Code of Civil Procedure barred the suit. The Court of first instance, accepting the plea, dismissed the suit. On appeal by the plaintiffs the learned District Judge set aside the decree of the first Court and remanded the case under section 562 of the Code of Civil Procedure. The lower appellate Court came to the conclusion that section 43 of the Code of Civil Procedure did not bar the suit and that the cause of action for the surplus arose subsequently to that for redemption and was a distinct cause of action. The defendant has appealed to this Court. It is argued on his behalf that the cause of action for surplus profits in a redemption suit is not separate from the cause of action for the recovery of the possession of the property mortgaged and that the mortgagor in such a suit has only one single cause of action against the mortgagee in possession. This contention, I am of opinion, is perfectly sound. The comprehensive character of suits relating to mortgages and the obligation incumbent on litigants to see that the decree in them covers all rights is well known—*Vinayak* v. *Dattatraya* (1)—and a

(1) (1902) I. L. R., 26 Bom., 661, at p. 668.

mortgagor in a redemption suit has not only to claim possession, where the mortgagee has it, but he has also to claim surplus collections if any. His cause of action in a redemption suit is a single cause of action, and a demand for the excess collections, if any, forms an essential part of his whole claim in respect of that cause of action, and hence, if the plaintiff in a redemption suit succeeds, the Court has to pass a decree, ordering that an account shall be taken (section 92 of the Transfer of Property Act). Regarding the principle already stated, the learned Judges in the case of *Baloji* v. *Tamangouda* (1) remark :—"In this case the plaintiff, who claims under the mortgagor, sues to recover over-payments on account of a mortgage which has been redeemed. We are of opinion that the claim which arose out of the cause of action when the suit for redemption was filed was that the plaintiff, the mortgagor, was entitled, first, to recover possession of the mortgaged property on the ground that the mortgage had been satisfied out of the rents and profits received by the mortgagees, and, secondly, to get back any sum overpaid, and that therefore, the first suit should have claimed both possession and the surplus as required by section 7 of the Code of Civil Procedure, which provide that 'every suit shall include the whole of the claim arising out of the same cause of action.' The proper decree would have been to order payment of the surplus, on the ground that the mortgagees were trustees of the mortgagor and that the money in their hands belonged to them."

There in fact may be suits for redemption in which a demand for a surplus directly flowing from a settlement of accounts may be *co-extensive* with the *whole* claim of a mortgagor in respect of his cause of action to redeem. The right to claim the surplus profits is synchronous with the right to claim possession of the mortgaged property, and to hold that the cause of action for claiming excess collections accrues when the mortgage debt has been satisfied is inconsistent with the principles on which the law of redemption is based.

The question of accounts in a redemption suit must not be mixed up with the question of mesne profits in a suit for the recovery of immovable property against a trespasser, for the

(1) (1869) 6 Bom., H. C. Rep., A. C. J., 97, at p. 99.

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position of a mortgagee in possession is very different from that of a trespasser. The possession of the mortgagee before redemption is possession for the mortgagor and he "becomes a trustee for the mortgagor after he has been paid." (Ashburner on Equity, p. 258). He has, therefore, to deliver possession of the mortgaged property and to "account for his gross receipts from the mortgaged property" (section 76 of the Transfer of Property Act). The possession of a trespasser is of an adverse nature and section 44 of the Code of Civil Procedure shows that the cause of action for mesne profits is distinct from that for the recovery of immoveable property. In India "the policy of the law has been to allow a plaintiff to enforce a claim for possession of land and for mesne profits, either in one suit or two as he might think proper, but at the same time to induce him, if there is no reason to the contrary, to dispose of his whole claim in one suit only." *Kishori Lal Roy* v. *Sharut Chunder Mozumdar* (1) quoted with approval in *Lalessor Babui* v. *Janki Bibi* (2). Such being the distinction between a claim for surplus collections in a redemption suit and a claim for mesne profits in a suit in ejectment, the cases of *Mon Mohun Sirkar* v. *The Secretary of State for India* (3) and of *Ram Dayal* v. *Madan Mohan Lal* (4), which deal with the suits for mesne profits, have no bearing upon the case before me.

Maksud Ali v. *Nargis Dye* (5) and *Amanat Bibi* v. *Imdad Husain* (6) have also nothing to do with a suit for surplus profits brought after a suit for redemption.

It is contended on behalf of the respondent that article 105 of the Indian Limitation Act (No. XV of 1877) provides three years' limitation for the recovery of surplus collections received by the mortgagee from the date when the mortgagor re-enters on the mortgaged property, and that this indicates that there can be a separate suit for excess collections.

The article in my opinion contemplates a case other than that of redemption. When a mortgagor takes possession of the mortgaged property, not in execution of a decree for redemption, but in some other way, then article 105 applies. In *Baboo Gour*

(1) (1882) I. L. R., 8 Calc., 593.
(2) (1891) I. L. R., 19 Calc., 615.
(3) (1890) I. L. R., 17 Calc., 968.
(4) (1899) I. L. R., 21 All., 425.
(5) (1892) I. L. R., 20 Calc., 322.
(6) (1888) L. R., 15 I. A., 106.

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Kishen Singh v. *Sahay Fukeer Chund* (1) it was ruled that a suit for redemption does not debar the mortgagor from afterwards suing the mortgagee in possession for mesne profits payable between the date of suit and the execution of the decree for redemption. In that case the mortgagor, as has been observed by the learned judges in *Satyabadi Behara* v. *Harabati* (2), had sued under Regulation I of 1798, while the scheme of the Transfer of Property Act is quite different. For the reasons given above I would allow the appeal.

BY THE COURT.—The order of the Court is that the appeal be allowed. The order of the learned District Judge remanding the case under section 562 of the Code of Civil Procedure is set aside, and the decree of the Court of first instance is restored. The appellant will have his costs here and in the Court below.

Appeal decreed.

1908 *March* 12.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

WILAYATI BEGAM (PLAINTIFF) *v.* NAND KISHORE (DEFENDANT).*

Civil Procedure Code, section 244—Question relating to the execution, discharge or satisfaction of the decree—Contest between the holder of a decree for an undivided share of joint property and an auction purchaser pendente lite.

One Wilayati Begam obtained a decree for possession of a share in certain joint and undivided zamindari property, and this decree was executed so far as might be by delivery of formal possession. While the suit in which this decree was passed was pending, one Raghunath Das obtained a simple money decree against another co-sharer in the zamindari, and in execution thereof brought the property to sale and it was purchased by Nand Kishore. Nand Kishore got possession. Wilayati Begam applied for mutation of names in her favour, but was resisted by Nand Kishore, and accordingly instituted a suit against Nand Kishore praying for a declaration of her title as against him. *Held* that such a suit was not obnoxious to the prohibition contained in section 244 of the Code of Civil Procedure. *Gulzari Lal* v. *Madho Ram* (3) distinguished. *Jagan Nath* v. *Milap Chand* (4) and *Kino* v. *Rudkin* (5) referred to.

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* Appeal No. 53 of 1907 under section 10 of the Letters Patent.

(1) (1867) 7 W. R., 364.
(2) (1907) I. L. R., 34 Calc., 223.
(3) (1904) I. L. R., 26 All., 447.
(4) (1906) I. L. R., 28 All., 722.
(5) (1877) L. R., 6 Ch. D., 160.

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WILAYATI BEGAM v. NAND KISHORE.

The facts of this case are as follows:—

Musammat Wilayati Begam was entitled to an undivided share of the estate of one Nihali Begam consisting of a 16 biswansi zamindari share of a mahal and also sir land appertaining thereto. She brought a suit against Ali Sher Khan and others for recovery of this share, and on the 12th of December 1896 got a decree for possession. This decree was not put into execution until the 6th of December 1899. Formal possession was given in 1900. While this suit was pending, one Raghunath Das, who had obtained a simple money decree against Ali Sher Khan and the other defendants to the suit of Wilayati Begam, attached and sold the property in which Wilayati Begam was a share-holder, and at the auction sale the defendant, Nand Kishore, became the purchaser on the 20th of August 1895. In 1899 he got possession of the property so purchased. Wilayati Begam applied in the mutation department to have her name recorded in respect of her share, but Nand Kishore filed an objection and the objection was allowed. Thereupon Wilayati Begam instituted the present suit on the 25th of July 1904, praying for a declaration of her title to the share decreed to her in 1896.

The Court of first instance (Munsif of Etah) decreed the plaintiff's claim, but this decree was reversed on appeal by the Additional Judge of Aligarh, and on second appeal to the High Court, the plaintiff's appeal was dismissed on the ground that the suit was barred by section 244 of the Code of Civil Procedure. It was held that the case fell within the ruling in *Gulzari Lal* v. *Madho Ram* (1); that Nand Kishore was, as the purchaser in that case, the representative of the judgment-debtor within the meaning of section 244, and that the question raised was one relating to the execution of the decree, and that that question was only determinable by the Court executing the decree. Against this decree the plaintiff appealed under section 10 of the Letters Patent.

Maulvi *Abdul Majid*, for the appellant.

Mr. *G. W. Dillon*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The facts of this case are fully set out in the judgment of the learned Judge of this Court from whose decision this appeal has been preferred. They

(1) (1904) I. L. R. 26 All., 447.

are not complicated. The plaintiff Musammat Wilayati Begam was entitled to an undivided share of the estate of one Nihali Begam consisting of a 16 biswansi zamindari share of a mahal and also sir land appertaining thereto. She brought a suit against Ali Sher Khan and others for recovery of this share, and on the 12th of December 1896 got a decree for possession. This decree was not put into execution until the 6th of December 1899. Formal possession was given in 1900. While this suit was pending, one Raghunath Das, who had obtained a simple money decree against Ali Sher Khan and the other defendants to the suit of Wilayati Begam, attached and sold the property in which Wilayati Begam was a share-holder, and at the auction sale the defendant Nand Kishore became the purchaser on the 20th of August 1895. In 1899 he got possession of the property so purchased. The plaintiff appellant applied in the mutation department to have her name recorded in respect of her share, but Nand Kishore filed an objection and the objection was allowed. Thereupon the suit out of which this appeal has arisen was instituted on the 25th of July 1904.

The Court of first instance decreed the plaintiff's claim, but this decree was reversed on appeal, and on second appeal to this Court the learned Judge dismissed the appeal on the ground that the suit was barred by section 244 of the Code of Civil Procedure. He held that the case fell within the ruling in *Gulzari Lal* v. *Madho Ram* (1); that Nand Kishore was, as the purchaser in that case, the representative of the judgment-debtor within the meaning of section 244, and that the question raised was one relating to the execution of the decree, and that the question was only determinable by the Court executing the decree.

Now, was the question raised one relating to the execution of the decree? This is the important question. There is an aspect of the facts which does not appear to have been present to the mind of the learned Judge, and no doubt was not brought to his notice in argument. Musammat Wilayati Begam was entitled only to an undivided share of the property of Nihali Begam, and could not in her former suit obtain more than a

(1) (1904) I. L. R., 26 All., 447.

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decree declaring her title to that share. She could not in that suit have got more than formal possession. She could not obtain physical possession without instituting partition proceedings. The proceedings in execution in that suit, therefore, ended with the delivery of formal possession—*Jagan Nath* v. *Milap Chand* (1). Wilayati Begam having got formal possession in execution thereby exhausted all the remedies open to her in that suit. Physical possession could only be obtained by partition in the Revenue Court. Now let us see what was the position of Nand Kishore. He purchased the property in dispute *pendente lite*, that is, during the pendency of the suit of Wilayati Begam, and therefore became bound by the judgment which was obtained by the plaintiff against Ali Sher Khan and others. An alienation or assignment *pendente lite* is not permitted to affect the rights of other parties to a suit unless it disables the party who makes the alienation from carrying out the order of the Court, in which case the alienee or assignee must be brought before the Court. In the present case all that the plaintiff was entitled was a declaration of her title to her share in the estate of Begam, and there was no necessity to bring Nand Kishore, the purchaser *pendente lite*, before the Cou t. It was argued before us on behalf of the respondent that the plaintiff ought to have applied to have Nand Kishore added as a party and to have obtained a decree against him. But it appears to us that it was not obligatory on the plaintiff to make any such application. If she had made it, it would have rested in the discretion of the Court to grant or refuse the application. Now a grantee *pendente lite* cannot question the decree or any proceeding in the cause which from the nature of the suit and the relief prayed for might naturally result. The practice under the Judicature Act in England is similar in this respect to that prevailing in this country under the Civil Procedure Code, and in England the addition to the array of parties of a purchaser *pendente lite* is ordinarily not regarded as necessary—*Kino* v. *Rudkin* (2), also Daniel's Chancery Practice, 6th edn., p. 256. In view then of the fact that the plaintiff appellant in her former suit obtained all the relief to which she was entitled as a co-sharer in an

(1) (1906) I. L. R., 28 All., 722. (2) (1877) L. R., 6 Ch. D., 160, at p. 162.

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undivided estate, and that she obtained formal possession of her share in execution of the decree passed in that suit, we do not think that the ruling in the case of *Gulzari Lal* v. *Madho Ram* (1) bars her right to maintain the present suit. When the defendant resisted her claim to have her name recorded as owner in respect of her share, she was, we think, justified in instituting the suit out of which this appeal has arisen, which is one in substance for the declaration of her title to a share as against the defendant, who in the mutation proceedings denied her title, thereby throwing a cloud on it. She cannot obtain proprietary possession of the share unless she takes partition proceedings, and in so far as the Court of first instance granted her a decree for proprietary possession, that decree cannot be upheld. We allow the appeal, set aside the decree of the learned Judge of this Court and also the decree in the lower appellate Court and decree the plaintiff's claim for a declaration of her title as claimed with costs in all Courts.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1908 *March* 13.

BALWANT SINGH AND ANOTHER (PLAINTIFFS) *v.* SHANKAR (DEFENDANT) *

Wajib-ul-arz—Construction of document—House tax—Cess—Rent.

Under the wajib-ul-arz of a village called Radhakund the zamindar was declared to be entitled to one *taka* (six pies) per month for every house from the occupants of the village and also from the owners of shops and temples. *Held* that this payment (which was called "gharghanna") was not a house-tax, or cess, but merely ground-rent and did not require special sanction.

THE plaintiff in the suit out of which this appeal arose was the zamindar of the village of Radhakund in the district of Muttra and the defendant occupied a house in the *abadi* of that village. The plaintiff sued to recover three years' rent of the house so occupied by the defendant. The suit was based upon the wajib-ul-arz of the village which provided that the zamindar was entitled to one *taka* (that is, 6 pies) per month for every house from the occupants of the village and also from the owners

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* Appeal No. 68 of 1907 under section 10 of the Letters Patent, from a judgment of Griffin J., dated the 25th of July, 1907.

(1) (1904) I. L. R., 26 All., 447.

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of shops and temples. The defence set up by the defendant was that this rent had never been paid and was not leviable by the plaintiff.

The Court of first instance (Munsif of Muttra) decreed the plaintiff's claim, and this decree was affirmed on appeal by the Additional Subordinate Judge of Agra, the lower Court finding that the alleged custom was proved. On second appeal, these decrees were set aside by a single Judge of the High Court, and the plaintiff's suit dismissed, upon the ground that the payment claimed was in the nature of a cess, and, being unauthorized, was not legally recoverable. From this decree the plaintiff appealed under section 10 of the Letters Patent.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Lala *Kedar Nath*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The plaintiff appellant is the zamindar of the village of Radhakund in the district of Muttra and the defendant occupies a house in the *abadi* of that village. The claim of the plaintiff is to recover three years' rent of the house so occupied by the defendant. Under the wajib-ul-arz of the village the zamindar is declared to be entitled to one *taka*(that is, 6 pies) per month for every house from the occupants of the village and also from the owners of shops and temples. The defence set up by the defendant was that this rent had never been paid and was not leviable by the plaintiff. The Court of first instance decreed the plaintiff's claim and this decree was affirmed on appeal, the lower Courts finding that the alleged custom was proved. On second appeal, however, the learned Judge of this Court allowed the appeal, reversed the decision of the Courts below and dismissed the plaintiff's suit.* The judgment is largely based on the meaning of the word "*gharghanna*" which is used in the wajib-ul-arz as descriptive of the money payable to the zamindars in respect of houses in the village. The learned Judge observes that the word "*gharghanna*" is understood to be a house-tax. For this no authority is cited. He also states that the contention on behalf of the defendant was that a house-tax is a cess, and that before a zamindar can recover a cess, it must first find a place in the list prepared by

* See Weekly Notes, 1907, p. 247, s. v. Shankar v. Balwant.

the Settlement Officer and be sanctioned by the Local Government as provided for by section 66 of Act No. XIX of 1873. The learned Judge then refers to section 56 and section 86 of the Land Revenue Act, III of 1901, and holds that, reading these two sections together, it was the intention of the Legislature that no demands apart from rent by a landlord against tenants should be recognized in the Civil Courts which had not been recorded by the Settlement Officer and sanctioned by the Local Government as regular cesses. Now in the first place we may point out that the only rent demanded by the zamindar in respect of the occupation of houses in the abadi of the village is this charge of half an anna per month. No other rent is payable. Section 56, therefore, has no application, because it refers to cesses which are payable by tenants in addition to the rent paid by those tenants. The charge in question is not a charge in addition to any rent. It is in fact the rent paid in respect of the site upon which the house of the occupier stands, or in other words a ground rent. Section 86 has also, we think, no application, for this reason, that the reservation sanctioned by the wajib-ul-arz of a monthly payment is the reservation of a ground rent and not a cess within the meaning of the Revenue Act. We think that the learned Judge of this Court was wrong in the interpretation which he put upon the word "*gharghanna*" as used in the wajib-ul-arz, and that that word means nothing more than the rent payable in respect of the houses in the abadi of the village and is in no sense a house-tax or cess, as laid down by him. We therefore allow the appeal, set aside the decision of the learned Judge of this Court and restore the decree of the lower appellate Court with costs in all Courts.

Appeal decreed.

Before Mr. Justice Sir George Knox.

1908
March 13.

KHIALI RAM (PLAINTIFF) *v.* HIMMATA AND OTHERS (DEFENDANTS).*

Act No. III of 1877 (*Indian Registration Act*), *section* 50—*Mortgage—Sale of property comprised in an unregistered mortgage—Liability of purchaser —Notice.*

Property was purchased which was the subject of an unregistered mortgage, the registration of which was not compulsory. The purchaser had no notice of the mortgage at the time of execution of the sale-deed in his favour, but received notice before the sale-deed was registered. *Held* that the mortgage was binding on the purchaser. The principle of *Diwan Singh* v. *Jadho Singh* (1) and *Bhikhi Rai* v. *Udit Narain Singh* (2) applied.

THE facts of this case are as follows:—

One Khiali Ram was the holder of an unregistered mortgage-deed, dated the 27th of January 1895. The deed was one the registration of which was not compulsory under the Indian Registration Act. He sued the obligors of the deed to recover the money due under his deed and in default to bring to sale the property hypothecated in the deed. He also added to the suit as a party one Bhoja, who had purchased the same property under a sale-deed, dated the 8th of February 1905, but not registered until the 7th of April 1905. The Court of first instance (first Additional Munsif of Meerut) dismissed the claim, and the lower appellate Court (Additional District Judge) on appeal arrived at the same finding. It held that there was no evidence to show that the respondent, Bhoja, had any knowledge of the plaintiff's mortgage on the date of the sale; but it further found that a notice was served on Bhoja after the execution of the sale-deed, but before its registration. The lower appellate Court held that as there was no evidence to show that the respondent, Bhoja, had notice on the date he got the sale-deed executed, he was not bound to pay the amount of the mortgage. The plaintiff appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

Babu *Surendra Nath Sen*, for the respondents.

KNOX, J.—This second appeal arises out of a suit brought by Khiali Ram. Khiali Ram is a holder of an unregistered

* Second Appeal No. 3 of 1907, from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut, dated the 20th of September, 1906, confirming a decree of Ram Chandra Chaudhri, Additional Munsif of Meerut, dated the 6th of January, 1906.

(1) (1896) I. L. R., 19 All., 145. (2) (1903) I. L. R., 25 All., 366.

mortgage-deed, dated the 27th of January 1895. The deed was one the registration of which was not compulsory under the Indian Registration Act. He sued the obligors of the deed to recover the money due under his deed and in default to bring to sale the property hypothecated in the deed. He also added to the suit as a party one Bhoja, who had purchased the same property under a sale-deed, dated the 8th of February 1905, but not registered until the 7th of April 1905. The Court of first instance dismissed the claim and the lower appellate Court on appeal arrived at the same finding. It held that there was no evidence to show that the respondent Bhoja had any knowledge of the plaintiff's mortgage on the date of the sale, but it further found that a notice was served on Bhoja after the execution of the sale-deed, but before its registration. The lower appellate Court observed further that as there was no evidence to show that the respondent Bhoja had notice on the date he got the sale-deed executed, he was not bound to pay the amount of the mortgage. In appeal it is contended before me that the respondent Bhoja having received notice of the plaintiff's mortgage before the registration of the sale-deed in his favour the said respondent is bound by the same.

The learned vakil for the respondents takes his stand upon the provisions contained in sections 47 and 50 of the Indian Registration Act, and he cites in support of his position the principle laid down in *Hasha* v. *Ragho Ambo Gondhali* (1). He further drew attention to the case of *Santaya Mangarsaya* v. *Narayan* (2), likewise to the case of *Abdul Majid* v. *Muhammad Faiz-ullah* (3) and *Baldeo Prasad* v. *Baldeo* (4). None of these cases cited are exactly in point or on all fours with the present case.

On the other hand the principle laid down by my brother Aikman in *Diwan Singh* v. *Jadho Singh* (5), which was afterwards restated and affirmed in *Bhikhi Rai* v. *Udit Narain Singh* (6) is a principle which can without difficulty be extended to the circumstances of the present case. It is true

(1) (1881) I. L. R., 6 Bom., 165.
(2) (1883) I. L. R., 8 Bom., 182.
(3) (1890) I. L. R., 13 All., 89.
(4) Weekly Notes., 1901, p. 112.
(5) (1896) I. L. R., 19 All., 145.
(6) (1903) I. L. R., 25 All., 366.

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that in neither of these the facts are exactly the same as the facts in the present case, but the principle that section 50 of the Indian Registration Act will not avail to the holder of a subsequently registered deed over an earlier deed not compulsorily registrable, if the holder of the registered deed at the time of the registration had notice of the earlier unregistered deed, is one, as I have already said, which can easily be extended to and covers the position of the parties in the case before me. At the time when Bhoja was informed by letter of the plaintiff's mortgage he had ample time to reconsider his position and to refuse to register the deed. He had notice of the previous transaction sufficient to put him on enquiry, and could have ascertained whether in taking the sale-deed he was or was not taking it subject to the incumbrance of 1895. The plea taken in appeal prevails. The appeal is decreed, the decrees of the Courts below are set aside, and as this decision is upon a preliminary point, upon which the Courts below have erred, the case will be returned to the Court below under section 562 of the Code of Civil Procedure with directions to re-admit it on its file of pending cases and dispose of it according to law. Costs here and hitherto will abide the event. *

Appeal decreed and cause remanded.

1908
March 14.

Before Mr. Justice Richards.

KHAIRATI (DEFENDANT) *v.* BANNI BEGAM (PLAINTIFF).†

Act No. IV of 1882 (*Transfer of Property Act*), *section* 85—*Mortgage—Suit for sale on a mortgage—Parties.*

Whether or not section 85 of the Transfer of Property Act, 1882, refers solely to persons interested in the equity of redemption, it is not essential to join as a party defendant in a suit for sale on a mortgage a person whose interest in the mortgaged property, if it exists, would be antagonistic to the claims of both mortgagor and mortgagee. *Jaggeswar Datt* v. *Bhuban Mohan Mitra* (1) referred to.

THE facts of this case are as follows :—

The defendant in the suit out of which this appeal arose—one Khairati—held a mortgage, dated the 10th of December,

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* [Cf. also *Tejpal* v. *Girdhari Lal*, *supra* p. 130—Ed.]

† Second Appeal No. 23 of 1907, from a decree of D. R. Lyle, District Judge of Moradabad, dated the 3rd of December 1906, confirming a decree of Deoki Nandan Sahi, Munsif of Moradabad, dated the 7th of August 1905.

(1) (1906) I. L. R. 33 Calc., 425.

1895, from one Intizam Begam. On the 29th of August 1904, Khairati brought a suit for sale upon this mortgage and obtained a decree. When, however, he applied for execution of this decree, he was resisted by Musammat Banni Begam, the mother-in-law of Intizam Begam, who claimed the property mortgaged as her own. Banni Begam's objections having been disallowed, she brought the present suit under section 283 of the Code of Civil Procedure. The Court of first instance (Munsif of Moradabad) decreed the plaintiff's claim upon the ground that Khairati knew that Banni Begam claimed that Intizam Begam was a benamidar on her behalf, and that he was therefore bound to make her a party to the suit on his mortgage. In appeal this decision was upheld by the District Judge. Khairati thereupon appealed to the High Court.

Munshi *Gokul Prasad* (for whom Lala *Jang Bahadur Lal*), for the appellant.

The respondent was not represented.

RICHARDS, J.—Khairati, defendant in the present suit, brought a suit on the 29th August 1904 upon foot of a mortgage, dated the 10th December 1895, whereby Intizam Begam mortgaged the property, the subject matter of the present suit, to him. He only made his mortgagor Intizam Begam, a defendant to the suit. A decree was obtained, but when Khairati applied for execution the property was claimed by Banni Begam, the mother-in-law of Intizam Begam. The present suit was then instituted by Banni Begam under the provisions of section 283 of the Code of Civil Procedure. The Courts below have decided the suit in favour of Banni Begam on the simple ground that Khairati knew that Banni Begam claimed that Intizam Begam was benamidar for her, and that he was bound to make her a party to the suit he brought on foot of his mortgage. I have only to consider whether the lower Courts were justified in decreeing Banni Begam's suit without coming to any finding whether or not the property was really the property of the plaintiff, or on any other issue arising in the case. Section 85 of the Transfer of Property Act provides that in a mortgage suit, all persons having an interest in the property comprised in the mortgage must be made parties. In the present suit, no doubt, Khairati knew that Banni Begam

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claimed the property. Her claim, however, was adverse to both mortgagor and mortgagee. Khairati could not admit her claim. To do so would be fatal to his mortgage and the suit on foot thereof.

In the case of *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1) it was held that adverse claimants ought not to be made parties to a mortgage suit for the purpose of litigating their titles, and that the only proper parties to such a suit are persons interested in the equity of redemption. In a carefully considered judgment, Mookerjee, J., gives many cogent reasons for such a proposition. In the present appeal it is unnecessary for me to decide that Khairati's suit would have been bad had he joined Banni Begam as a party, but the Courts below have held that his suit was bad because he did not join her as a defendant.

I certainly agree with the learned Judges who decided the case I have cited that as a general rule it would be highly inconvenient to allow adverse titles paramount to that of the mortgagor and mortgagee to be litigated in a mortgage suit. To do so would cause the greatest confusion. Section 45 of the Code of Civil Procedure provides that when causes of action are joined which the Court considers cannot be conveniently tried or disposed of together it may order separate trials or any other order that may be necessary or expedient. Possibly this enactment is sufficient and a suit is not actually bad because an adverse claimant is made a party. I am, however, clearly of opinion that the suit of Khairati on his mortgage was not bad because he did not make Banni Begam a defendant, and this is the only matter necessary for decision in the present appeal. No one appears on behalf of the respondent.

I allow the appeal, set aside the decrees of both the Courts below and remand the case under section 562 of the Code of Civil Procedure to the Court of first instance through the lower appellate Court with directions to readmit the suit under its original number in the register and dispose of it according to law. The costs will be dealt with by the Court finally disposing of the case.

Appeal decreed.

(1) (1906) I. L. R., 33 Calc., 425

REVISIONAL CRIMINAL.

1908
March 16.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

EMPEROR *v.* SERH MAL.*

Criminal Procedure Code, sections 195, 439—*Sanction to prosecute—Revision—Powers of High Court.*

An application under section 195 of the Code of Criminal Procedure for sanction to prosecute was made to and granted by a Magistrate of the first class. A further application under section 195 of the Code to revoke the sanction was made to the Sessions Judge, but was rejected. *Held* that the High Court had power to send for the record of the case under section 435 and to interfere, if necessary, under section 439 of the Code of Criminal Procedure with these orders. *Kusal* v. *Badri Prasad* (1) overruled. *Muthuswami Mudali* v. *Veeni Chetti* (2) referred to.

In this case a Magistrate of the first class in the Banda district, on the application of one Bhairon Prasad, granted sanction for the prosecution of the applicant Serh Mal for an offence punishable under section 211 of the Indian Penal Code. Serh Mal applied to the Sessions Judge of Banda to revoke this sanction. The Sessions Judge declined to interfere. Serh Mal then applied to the High Court in revision, and the record was sent for under the provisions of section 435 of the Code of Criminal Procedure.

A preliminary objection was taken on the strength of the ruling in *Kusal* v. *Badri Prasad* (1) that the High Court had under the circumstances of the case no jurisdiction to interfere with the orders of the Courts below, even under section 439 of the Code of Criminal Procedure.

Mr. *C. C. Dillon* and Babu *Satya Chandra Mukerji*, for the applicant.

Babu *Durga Charan Banerji*, for the opposite party.

AIKMAN and KARAMAT HUSEIN, JJ.—A Magistrate of the first class in the Banda district on the application of one Bhairon Prasad granted sanction for the prosecution of the applicant Serh Mal for an offence punishable under section 211 of the Indian Penal Code. Serh Mal applied to the learned Sessions

* Criminal Revision No. 71 of 1908, from an order of J. L. Johnston, Sessions Judge of Banda, dated the 9th of December 1907, confirming an order of Gada Husain, first class Magistrate of Karwi, dated the 2nd of September 1907.

(1) Weekly Notes, 1907, p. 283. (2) (1907) I. L. R., 30 Mad., 382.

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Judge to revoke this sanction. The learned Judge declined to interfere. Serh Mal then applied to this Court in revision, and the record was sent for under the provisions of section 435 of the Code of Criminal Procedure.

The first question we have to consider is whether this Court can interfere in revision. We have been referred to a decision of a learned Judge of this Court in *Kusal* v. *Badri Prasad* (1). With the opening part of that judgment we are in full agreement If section 195 stood alone in the Code, we are of opinion that this Court would have no right to interfere in the case. With all deference to the learned Judges who decided the case *Muthuswami Mudali* v. *Veeni Chetti* (2), we are unable to hold that when a Sessions Judge refuses to interfere with a sanction granted by a Magistrate under section 195 of the Code of Criminal Procedure this refusal to interfere is equivalent to the giving of a sanction for the purposes of the section. We agree with what was said by Wallis, J., in the referring order in that case But in the case of *Kusal* v. *Badri Prasad*, the learned Judge went on to hold that in a case like the present this Court has no power of interference even under section 439 of the Code. With the utmost respect for the learned Judge this is a view which we are not prepared to adopt. It is a view, which, so far as we know, has not been taken either by this Court or by any other Court. We have been referred to an unreported case, Criminal Revision No. 612 of 1907, which is similar to the present case. In that case the application for revision was admitted by the same learned Judge who decided the case of *Kusal* v. *Badri Prasad* and was ultimately granted by another learned Judge of this Court. There can be no doubt that section 435 gives this Court power to call for and examine the record of a proceeding such as in this case was before the Courts below, and that power is given in order that this Court may satisfy itself of the correctness, legality or propriety of any order passed in the case. We do not think it could have been the intention of the Legislature that when a High Court under the powers conferred on it by section 435 calls for the record of a proceeding, it can only express an academic opinion as to the legality or propriety of the

(1) Weekly Notes, 1907, p. 283. (2) (1907) I. L. R., 30 Mad., 382.

order and cannot give effect to its opinion. Section 439, sub-section (1), provides that when the High Court has called up a case like the present, it may in its discretion exercise any of the powers conferred on a Court of appeal by section 195 of the Code. We are of opinion that this Court is thereby vested with the power to deal with the order of the Magistrate in the same way as the Sessions Judge might have dealt with it under section 195, clause (6). We hold therefore that there is no bar to our dealing with the case in revision.

Coming to the merits of the case we are of opinion that the order sanctioning the prosecution of the applicant for an offence under section 211 of the Indian Penal Code cannot be maintained. The order itself is defective inasmuch as it does not specify the Court or other place in which, and the occasion on which, the offence was committed. We should not have been inclined to interfere solely on the ground of this omission, but the learned advocate for the opposite party is unable to refer us to anything upon the record which in the slightest way supports the idea that Serh Mal committed an offence under section 211 of the Indian Penal Code. The learned advocate for the opposite party asks us to treat the case as if it were a sanction given for the prosecution of the applicant for the abetment of an offence under section 211. This we decline to do. But in order to save the applicant from further proceedings we feel bound to state that we are unable to discover on the record any materials sufficient to justify the prosecution of the applicant for the offence of abetment. We allow the application and revoke the sanction given by the Magistrate on the 2nd of September 1907 for the prosecution of Serh Mal for an offence under section 211 of the Indian Penal Code.

1908
March 16.

APPELLATE CIVIL.

Before Mr. Justice Aikman and M. Justice Karamat Husein.

SHER SINGH (JUDGMENT-DEBTOR) *v.* SRI RAM AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code, section 266—*Execution of decree—Attachment—Right to attach profits not yet due.*

Held that a mere right to receive profits, the profits in question not having yet accrued due is not susceptible of attachment in execution of a decree. *Haridas Acharjia Chowdhry* v. *Baroda Kishore Acharjia Chowdhry* (1), *Udoy Kumari Ghatwalin* v. *Hari Ram Shaha* (2), *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (3), *Jones* v. *Thompson* (4) and *Webb* v. *Stenton* (5) referred to.

IN this case Sri Ram and Ganeshi Lal, the holders of a decree against one Sher Singh, applied for the attachment of the profits which were then due to the judgment-debtor from the lambardar of the village on account of the *kharif* harvest of 1313 fasli, and also of the profits which would become due to him, but were not due at the time of the attachment, on account of the *rabi* harvest of the same year. The judgment-debtor preferred objections, but these were overruled by the Court of first instance (Subordinate Judge of Moradabad) and this decision was upheld by the District Judge. The judgment-debtor appealed to the High Court urging that the decree-holders were not entitled to attach future profits which had not at the time of the application for attachment accrued due.

Dr. *Tej Bahadur Sapru*, for the appellant.

Munshi *Gokul Prasad* (for whom Babu *Sarat Chandra Chaudhri*), for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.—The respondents decree-holders, in execution of a money decree which they had against the appellant, applied for the attachment of the profits which were then due to him from the lambardar of the village on account of the *kharif* harvest of 1313 Fasli, and also for the attachment of the profits which would become due to him, but

* Second Appeal No. 1213 of 1906, from a decree of D. R. Lyall, District Judge of Moradabad, dated the 29th of August 1906, confirming a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 9th of June 1906.

(1) (1899) I. L. R., 27 Calc., 38.
(2) (1901) I. L. R., 28 Calc., 483.
(3) (1871) 14 Moo., I. A., 40.
(4) (1858) 27 L. J., Q. B. D., 234.
(5) (1883) 11 Q. B. D., 518.

were not due at the time of the attachment on account of the *rabi* harvest of the same year. The judgment-debtor objected. His objections were overruled by the Court of first instance, whose decision was affirmed by the learned District Judge. The judgment-debtor comes here in second appeal. The learned advocate for the appellant confines his appeal to the question as to the right to attach the *rabi* profits. In support of his appeal he relies on the cases—*Hari Das Acharjia Chowdhry* v. *Baroda Kishore* (1) and *Udoy Kumari Ghatwalin* v. *Hari Ram Shaha* (2). These cases are not exactly on all fours with the present, but there are observations in the judgments which are in favour of the appellant. Reliance is also placed on the decision of the Privy Council in *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (3). We have referred to various English authorities and these too support the appellant's contention. In the case *Jones* v. *Thompson* (4) it was held that the mere fact that it is most probable that there will be a debt is not sufficient. There must be an actual debt. On this principle it appears—see the case *Webb* v. *Stenton* (5)—that the English Judges refuse to make orders attaching rent before it becomes due. In the case of the *rabi* profits here it is quite clear that there was no existing debt, there was a mere possibility that there might be money due to the judgment-debtor for profits when the accounts for the *rabi* harvest were made up. In our opinion this possible right of the judgment-debtor was not liable to attachment having regard to the provisions of section 266 of the Code of Civil Procedure. Reference was made in the course of the argument to attachment of salaries not yet due, but for these special provision is made in the section. We allow the appeal so far as it relates to the attachment of the profits of the *rabi* harvest of 1313 Fasli, and we set aside the attachment of the right to recover those profits. In other respects the appeal fails. Having regard to the result, we direct that the parties bear their own costs here and in the Courts below.

Decree modified.

(1) (1899) I. L. R., 27 Calc., 38.
(2) (1901) I. L. R., 28 Calc., 483.
(3) (1871) 14 Moo., I. A., 40.
(4) (1858) 27 L. J., Q. B. D., 234.
(5) (1883) 11 Q. B. D., 518.

1908
March 26.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

HAKIM SINGH AND ANOTHER (JUDGMENT DEBTORS) *v.* RAM SINGH (DECREE-HOLDER).*

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 88 *and* 89—*Civil Procedure Code, section* 250—*Execution of decree—Alleged payment out of Court not certified.*

Applications for an order absolute for sale under section 89 of the Transfer of Property Act, 1882, are applications for the execution of the decree under section 88 of the Act. *Oudh Behari Lal* v. *Nageshar Lal* (1) and *Mallikarjunadu Setti* v. *Lingamurti Pantulu* (2) referred to. To such applications section 258 of the Code of Civil Procedure is applicable and bars the recognition of payments made out of court in pursuance of the decree unless such payments are certified to the court in the manner prescribed by that section. *Vaidhinadasamy Ayyar* v. *Somasundram Pillai* (3) followed. *Mullikarjuna Sastri* v. *Narasimha Rao* (4) and *Hatem Ali Khundkar* v. *Abdul Ghaffur Khan* (5) dissented from.

IN this case the respondent obtained a decree under section 88 of the Transfer of Property Act against the appellants directing them to pay a sum of money, and in default ordering that the property mortgaged to the respondent should be sold. The respondent applied for an order absolute under section 89 of the Act. The judgment-debtors pleaded that they had paid a certain sum to the decree-holder out of Court. This was denied by the decree-holder. The Court of first instance (Munsif of Farrukhabad) found the payment proved and made an order absolute for sale to recover the balance due after deduction of the amount paid out of the Court. The decree-holder appealed. He pleaded that no payment had been made to him out of Court and further that it was not open to the Court, having regard to the provisions of section 258 of the Code of Civil Procedure, to recognise the payment out of Court. Without going into the first plea the learned District Judge sustained the second plea. The judgment-debtor appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

Mr. *M. L. Agarwala* and Babu *Damodar Das*, for the respondent.

* Second Appeal No. 627 of 1907, from a decree of Muhammad Ishaq Khan, District Judge of Farrukhabad, dated the 12th of March, 1907, reversing a decree of Shekhar Nath Banerji, Munsif of Farrukhabad, dated the 17th of November, 1906.

(1) (1890) I. L. R., 13 All., 278.
(2) (1902) I. L. R., 25 Mad., 244.
(3) (1905) I. L. R., 28 Mad., 473.
(4) (1901) I. L. R., 24 Mad., 412.
(5) (1903) 8 C. W. N., 102.

AIKMAN and KARAMAT HUSEIN, JJ.—The respondent obtained a decree under section 88 of the Transfer of Property Act against the appellants directing them to pay a sum of money, and in default ordering that the property mortgaged to the respondent should be sold. The respondent applied for an order absolute under section 89 of the Act. The judgment-debtors pleaded that they had paid a certain sum to the decree-holder out of Court. This was denied by the decree-holder. The Court of first instance found the payment proved and made an order absolute for sale to recover the balance due after deduction of the amount paid out of the Court. The decree-holder appealed. He pleaded that no payment had been made to him out of Court and further that it was not open to the Court, having regard to the provisions of section 258 of the Code of Civil Procedure to recognise the payment out of Court. Without going into the first plea the learned District Judge sustained the second plea. The judgment-debtors come here in second appeal. For the appellants it is argued that the provisions of section 258 have no application to the case. Reliance is placed upon a decision of the Madras High Court, *viz.*, *Mallikarjuna Sastri* v. *Narasimha Rao* (1) and on a decision of the Calcutta High Court in *Hatem Ali Khundkar* v. *Abdul Ghaffur Khan* (2). The former of these decisions has been overruled by a full Bench of the Madras High Court in *Vaidhinadasamy Ayyar* v. *Somasundram Pillai* (3). The latter case undoubtedly supports the appellants, but, with all deference to the learned Judges who decided it, we are unable to agree with them. The Full Bench case of the Madras High Court is in point, and is against the appellants. We agree with the view taken in that case. We hold that the money alleged by the judgment-debtors to have been paid out of Court was "money payable under a decree" within the meaning of section 258 of the Code of Civil Procedure. If it was paid out of Court and the decree-holder did not certify the payment, the judgment-debtor ought to have taken prompt steps within the time allowed by the Limitation Act to have the payment recorded as certified but they failed to do so. It has been held by this Court in

(1) (1901) I. L. R., 24 Mad., 412. (2) (1903) 8 C. W. N., 102.
(3) (1905) I. L. R., 28 Mad., 473.

1908

HAKIM SINGH v. RAM SINGH.

Oudh Behari Lal v. *Nageshar Lal* (1) and also by the Madras High Court in *Malikarjunadu Setti* v. *Lingamurti Pantulu* (2) that applications for an order absolute are applications for the execution of the decree under section 88. We are of opinion that the learned Judge was right in holding that the Court was precluded by the last paragraph of section 258 of the Code of Civil Procedure from recognising the alleged payment out of Court. If the view taken by the Calcutta High Court were adopted, it seems to us that the execution of a decree might by delayed by repeated pleas of payment out of Court, and that the Court might have to try what would really be a series of different suits arising out of the orginal decree. We dismiss the appeal with costs.

Appeal dismissed.

1908 *March* 31.

Before Mr. Justice Aikman.

MOHIB-ULLAH (OBJECTOR) *v.* ABDUL KHALIK AND OTHERS (DECREE-HOLDERS).*

Muhammadan law—Gift—Hiba bil mushaa—Possession.

Held that what is known to Muhammadan law as a *hiba bil mushaa*, or gift of an undivided joint property, is a valid gift if the donee obtains possession. *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (3) referred to.

IN this case the holders of a decree against one Wali Muhammad attached in execution thereof a certain house as belonging to their judgment-debtor. This house had belonged to Ghazi the father of Wali Muhammad. By a deed of gift executed on the 6th of April, 1906, Ghazi gave the house to his daughters-in-law Musammat Haliman and Musammat Ayesha in equal shares. Ayesha died, and her interest in the house devolved upon her son Mohib-ullah. Haliman and Mohib-ullah objected to the attachment of the house by the decree-holders. The Court of first instance (Munsif of Allahabad) disallowed Haliman's objection, but sustained that of Mohib-ullah upon the ground that Ayesha had taken possession of her share of the house. The decree-holders appealed, and the lower appellate Court

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* Second Appeal No. 982 of 1907, from a decree of Udit Narain Singh, Officiating Subordinate Judge of Allahabad, dated the 9th of July 1907, reversing a decree of Mohan Lal, Munsif of Allahabad, dated the 21st of November 1906.

(1) (1890) I. L. R., 13 All., 278. (2) (1902) I. L. R., 25 Mad., 244.
(3) (1889) I. L. R., 11 All., 460.

(Subordinate Judge) reversed the decision of the Munsif, holding that the gift, so far as it concerned Ayesha also, was invalid. Mohib-ullah appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Majid* and Babu *Durga Charan Banerji*, for the respondents.

AIKMAN, J.—The respondents attached a house as belonging to their judgment-debtor, Wali Muhammad, against whom they had obtained a decree. The house had belonged to Ghazi the father of Wali Muhammad. It is proved that Ghazi by a deed of gift executed on the 6th of April 1906, gave the house in equal shares to his daughters-in-law Musammat Haliman and Musammat Ayesha. Ayesha is dead, and the appellant Mohib-ullah is her son and heir. Musammat Haliman and Mohib-ullah objected to the attachment. Haliman's objection as to her half was overruled by the Munsif on the ground that at the time of the gift she was on a pilgrimage to Mecca and so did not get possession of the property. The learned Munsif found that Ayesha had got possession of her half share and sustained the objection of Mohib-ullah. On appeal by the decree-holders the learned Subordinate Judge found that the gift in favour of Ayesha was invalid according to Muhammadan law and overruled Mohib-ullah's objection. Mohib-ullah comes here in second appeal. The learned Subordinate Judge does not dissent from the finding that Ayesha got possession of her half, but he says that "the delivery of possession to Musammat Ayesha of the one moiety gifted away to her did not confer any right on her." The learned vakil for the appellant relies on what was said by their Lordships of the Privy Council in the case *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1) at pages 474 and 475 of their judgment. Their Lordships, referring to the authorities cited by Syed Ameer Ali in his Tagore Lectures of 1884, say:—"The authorities show that possession taken under an invalid gift of *mushaa* transfers the property according to the doctrines of both Shia and Sunni Schools." They add:—"The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined within

(1) (1889) I. L. R., 11 All., 460.

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the strictest rules." At page 42, Vol. I, of Ameer Ali's Muhammadan Law, 3rd edition, the author remarks:—"A *hiba bil mushaa* or gift of an undivided joint property, is not void, but only invalid, and possession remedies the defect." He goes on to cite various authorities in support of this view. The learned advocate for the respondents refers to the cases cited on page 434 of Macnaghten's Principles of Muhammadan Law and also to the opinion expressed by that author in paragraph 6, Chapter 5, page 50. It is not easy to reconcile all the authorities, but having regard to the findings of the Courts below that Ayesha did get possession of her half, and to the passage cited from the judgment of the Privy Council, I am of opinion that the appeal must succeed. I accordingly set aside the order of the Court below and restore the order of the Court of first instance. The appellant will have his costs here and in the Court below.

Appeal decreed.

1908
April 2.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

PHUL CHAND AND ANOTHER (DEFENDANTS) *v.* CHAND MAL, (PLAINTIFF).*

Civil Procedure Code, section 266—Execution of decree—Attachment—Mortgage—Right of mortgagor in respect of mortgage money promised but not paid.

Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance: he cannot sue for specific performance of the agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which can be the subject of attachment and sale under section 266 of the Code of Civil Procedure. *The South African Territories Company, Limited* v. *Wallington* (1) referred to.

THE facts of this case are as follows. On the 18th of April 1903 one Sheo Ram and another executed two mortgages in favour of the defendants Phul Chand and Gulab Chand to secure the principal sums of Rs. 1,000 and Rs. 6,000 respectively. It has been found that only Rs. 2,135-11 were paid by the mortgagees and that the remainder is unpaid. Some creditors of the

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* First Appeal No. 198 of 1906, from a decree of Parmatha Nath Banerji, Subordinate Judge of Jhansi, dated the 28th of May 1906.

(1) [1898] A. C., 309.

mortgagors obtained a money decree against them and in execution of that decree proceeded to attach what they described as the right of the mortgagors to receive the balance of the mortgage money and put this up for sale. This so-called right was purchased by the plaintiff on the 25th of November 1903. The suit out of which this appeal has arisen was then instituted by the plaintiff against the mortgagees for recovery of the amount alleged to be due by them and a decree for portion of the amount claimed was passed in favour of the plaintiff. The mortgagees thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the respondent.

STANLEY, C. J., and BURKITT, J.—The question involved in this appeal is one out of the ordinary course. On the 18th of April 1903 one Sheo Ram and another executed two mortgages in favour of the defendants Phul Chand and Gulab Chand to secure the principal sums of Rs. 1,000 and Rs. 6,000 respectively. It has been found that only Rs. 2,135-11 were paid by the mortgagees and that the remainder is unpaid. Some creditors of the mortgagors obtained a money decree against them and in execution of that decree proceeded to attach what they described as the right of the mortgagors to receive the balance of the mortgage money and put this up for sale. This so-called right was purchased by the plaintiff on the 25th of November 1903. The suit out of which this appeal has arisen was then instituted by the plaintiff against the mortgagees for recovery of the amount alleged to be due by them and a decree for portion of the amount claimed was passed in favour of the plaintiff. The present appeal was then preferred, and the main ground of appeal is that there was no debt due by the mortgagees to the mortgagors which could be attached within the meaning of section 266 of the Code of Civil Procedure; that the promises of the mortgagees to lend the amounts mentioned in the mortgage-deeds did not constitute debts which could be attached, and that the only remedy, if any, of the mortgagors against their mortgagees was a suit for damages for breach of contract, if any damages could be proved.

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The question is not free from difficulty, but it appears to us that a decision of the House of Lords, which was brought to our notice by the learned advocate for the respondents, must be taken by us to be conclusive on the point. This is the case of *The South African Territories Company, Limited* v. *Wallington* (1). The facts of that case were shortly as follows. The plaintiff Company issued sixteen debentures to the defendant Wallington on his undertaking to pay the face value of the debentures by instalments. Wallington paid some of the early instalments, but failed to pay the balance, and thereupon a suit was instituted against him for specific performance of his agreement or for damages. Wright, J., before whom the trial took place, held that the claim for specific performance could not be sustained, but gave judgment for the plaintiff Company for damages on the ground that a debt had been created by the defendant's promise to pay, contained in his letter of application for the debentures. Judgment was entered for the plaintiffs for £520, the amount of the instalments due and unpaid up to the date of the writ, and costs. An appeal was preferred, which was heard by Lord Esher, M. R., and Lopes and Chitty, L. J. J., who reversed the decision of the Court below and entered up judgment for the defendant. An appeal was preferred to the House of Lords, with the result that the decision of the Court of Appeal was upheld. Their Lordships held that on the default of Wallington to make the payments which he had undertaken to pay, the moneys remaining due by him for unpaid instalments did not constitute a debt to the Company; that the Company was only entitled to damages for actual loss caused by the breach of contract. Lord Halsbury, L. C., in his judgment, with respect to the claim for specific performance, remarked that "a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any Court or any member of any Court has entertained a doubt but that the refusal of the learned Judge below to grant a decree for specific performance was perfectly right. But of course in this, like any other contract, one party to the contract has a right to complain that the other party has broken it, and if he establishes that proposition he

(1) [1898] A. C., 309

is entitled to such damages as are appropriate to the nature of the contract." Lord Watson in the course of his judgment observed that "the only engagement made by the respondent with the Company consisted in a promise to advance money to them in loan; and it is settled in the law of England that such a promise cannot sustain a suit for specific performance," and later on he says:—"The only remedy open to the Company was by action against the respondent for any loss or damage which they might sustain through his breach of promise." The other Lords endorsed this view, namely, that no suit will lie to compel a party to fulfilkan agreement to advance money. This decision is in entire accord with the view which we expressed at an early stage of the hearing and carrying the weight which it necessarily does, must conclude this appeal. The mortgagees were never in a position to enforce specific performance of the agreement of the mortgagees to advance the full sum agreed to be lent by them. The unpaid portion of the loan did not constitute a debt due by them to the mortgagors such as could be attached under the Code of Civil Procedure. It may be that the mortgagors have some ground of complaint against the mortgagees, and they may be in a position to obtain damages for the breach by the mortgagees of their contract, but this matter is not before us and we express no opinion upon it. We merely hold that the plaintiff has no cause of action against the mortgagees. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in both Courts.*

Appeal decreed.

* [Cf. Sher Singh v. Sri Ram, *Supra* p. 246—Ed.].

1908
April 4.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

RAM PRASAD AND OTHERS (DEFENDANTS) *v.* MAN MOHAN AND OTHERS (PLAINTIFFS)*

Hindu law—Joint Hindu family—Foreclosure of mortgage—Sons not made parties—Right of sons to redeem—Act No. IV of 1882 *(Transfer of Property Act), section* 85.

The mortgagees of a mortgage of joint family property executed by the father alone sued for and obtained a decree for foreclosure. At the time the suit was instituted the mortgagees knew that there were sons and grandsons jointly interested with the mortgagor in the mortgaged property, but, notwithstanding this, they omitted to make them parties to their suit.

Held that the sons and grandsons were not precluded from instituting a suit for redemption. *Bhawani Prasad* v. *Kallu* (1) referred to. *Debi Singh* v. *Jia Ram* (2) distinguished.

IN this case certain mortgagees obtained a decree for foreclosure of a mortgage held by them against one Phul Singh who was the father of some of the plaintiffs and grandfather of the others. The mortgagees, notwithstanding that they were aware of the existence of the plaintiffs and of their interest in the mortgaged property, omitted to make them parties to their suit for foreclosure. The plaintiffs then instituted the present suit, admitting their liability to satisfy the debt incurred by the mortgagor, but asking to be given an opportunity to redeem the mortgage. The Court of first instance (Munsif of Lalitpur) held that the suit was not maintainable and accordingly dismissed it. On appeal the lower appellate Court (District Judge of Jhansi) reversed the decision of the Munsif and remanded the suit under section 562 of the Code of Civil Procedure. Against this order of remand the mortgagees defendants appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Babu *Sarat Chandra Chaudhri*) and Munshi *Deokinandan*, for the appellants.

Mr. *E. A. Howard* and Babu *Durga Charan Banerji*, for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.—The appellants obtained a decree for foreclosure against one Phul Singh, who is father of some of the respondents and grandfather of the others. It is found that, although the appellants had notice of the interests of

* First Appeal No. 88 of 1907, from an order of H. E. Holme, District Judge of Jhansi, dated the 4th of July 1907.

(1) (1895) I. L. R., 17 All., 537. (2) (1902) I. L. R., 25 All., 214.

the sons and grandsons, they did not implead them in the suit for foreclosure. The respondents brought the suit out of which this appeal arises asking to be given an opportunity to redeem the mortgage. They did not dispute their liability to satisfy the debt incurred by the mortgagor. The Court of first instance held that the suit was not maintainable. On appeal the learned District Judge held that it was, and sent the case back for decision on the merits. The present appeal has been preferred against this order of remand.

It is contended that we ought to apply to this case the principle of the ruling of the Full Bench in *Debi Singh* v. *Jia Ram* (1). That was a case in which the sons of a Hindu father sued to get back from innocent purchasers their share of the family estate, which had been sold in execution of a decree obtained upon a mortgage by their father in a suit to which they were no parties. Their claim was based solely on the ground that they had not been parties to the suit, in which the decree was obtained. In the judgment of the learned Chief Justice in that case, which was concurred in by Knox, J., stress is repeatedly laid on the fact that the plaintiffs wished to oust strangers—see pages 233, 225, and particularly 226, of the judgment. In this case all that the plaintiffs ask is that they should be given an opportunity to redeem the mortgage which was foreclosed by the appellants, who knew of the plaintiffs' interest and yet did not make them parties to the suit to foreclose. In our opinion we should not be justified in extending the principle laid down in the case relied on behalf of the appellants to the present case. It was owing to the appellants' failure to comply with the provision of law that the respondents did not have an opportunity to redeem. In our opinion the observations of Banerji, J., in the Full Bench case, *Bhawani Prasad* v. *Kallu* (2), at page 548 of the judgment, and the observations of Edge, C.J., at page 562 and following pages are distinctly in favour of the view taken by the learned District Judge. The judgment of the Chief Justice in that case was concurred in by three other Judges who took part in deciding the case. In our opinion the appeal fails, and it is dismissed with costs.

Appeal dismissed.

(1) (1902) I. L. R., 25 All., 214. (2) (1895) I. L. R., 17 All., 537.

P. C.
1908
February 11,
April 2.

PRIVY COUNCIL.

DALIP SINGH AND OTHERS (DEFENDANTS) *v.* NAWAL KUNWAR AND ANOTHER (PLAINTIFFS.)

[On appeal from the High Court of Judicature, North-Western Provinces, Allahabad.]

Privy Council, Practice of—Courts in India differing as to question of fact—Question as to a mortgage being a real or fictitious transaction—Circumstances to be taken into consideration in dealing with conflicting evidence.

On the question whether a mortgage was a fictitious or a real transaction, there was evidence on each side bearing directly on the character of the transaction, but on neither side was the evidence wholly convincing. Persons whom one might have expected to be prominent witnesses were not called, and the evidence given by those who were called was open to much adverse criticism. The Courts in India differed, the Subordinate Judge deciding that the mortgage was fictitious, and the High Court holding it to be a genuine transaction. *Held* by the Judicial Committee that in determining which story was to be accepted it was necessary for their Lordships to rely largely upon surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions; and their subsequent conduct: and so dealing with the case their Lordships upheld the decision of the High Court.

The fact that if a genuine transaction it was advantageous to th mortgagor, and if fictitious it afforded him no immediate protection from creditors (which was the motive alleged by the defendants for entering into the transaction) was a very material circumstance in the case.

APPEAL from a judgment and decree (17th November 1902) of the High Court at Allahabad which reversed a judgment and decree (23rd December 1899) of the Court of the Subordinate Judge of Meerut.

The principal question involved in this appeal was whether a deed of mortgage executed on the 10th January 1889 was a genuine or fictitious transaction.

Partab Singh, who was the owner of certain land and houses at Meerut, had two sons, Bakhtawar Singh and Risal Singh, the latter of whom was a minor at the time of the transactions which gave rise to the litigation out of which the appeal arose. On 23rd August 1884 Partab Singh executed a promissory note for Rs. 300 in favour of Kishan Sahai Sahu. On the 14th July 1885 he executed a mortgage for Rs. 3,000 of a share in land and one-half

Present:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE and Sir ARTHUR WILSON.

of a house in favour of Shibban Lal; and on 6th January 1886 in consideration of an advance of Rs. 1,300 from Munna Lal, he mortgaged to him the one house and one-half of another house. During 1886, 1887 and 1888 Partab Singh borrowed further sums of money from Munna Lal.

On 10th January 1889 Partab Singh executed the mortgage now in dispute in favour of Chaudhrain Nawal Kunwar. It was also executed by Bakhtawar Singh for himself, and by Partab Singh as guardian of his minor son Risal Singh. The consideration was made up as follows:—For payment to Munna Lal Rs. 3,250; for payment to Bhawani Prasad and Banarsi Das, heirs of Shibban Lal, Rs. 4,528; for payment to Kishan Sahai Rs. 515; due to Nawal Kunwar on a bond dated 14th March 1888, Rs. 549; expenses in connection with the execution of the deed Rs. 158; and in cash Rs. 1,000; making in all Rs. 10,000. The mortgagee, Nawal Kunwar, undertook to discharge the debts above-mentioned; and not being at the time in possession of a large sum in cash, she on 10th January 1889, borrowed Rs. 5,000 from Munna Lal, who on making the advance paid her only the sum of Rs. 1,750 in cash and applied the balance to the discharge of his debt. In pursuance of her agreement, Nawal Kunwar paid off Kishan Sahai, and also paid Rs. 2,865-9-0 to the heirs of Shibban Lal, she did not pay the balance, as Partab Singh, in violation of his covenant, did not deliver to her possession of the property mortgaged.

On 18th July 1896, Partab Singh having died, his sons Bakhtawar Singh and Risal Singh sold the property mortgaged to Munna Lal for the sum of Rs. 25,750; out of the consideration the vendee retained the sum of Rs. 10,000 for payment of Nawal Kunwar's mortgage of 10th January 1889, and the deed recited that the debt due to her had been discharged by payment.

On 18th January 1898 Jainti Prasad, the son of Munna Lal then deceased sold a small portion of the property to one Dalip Singh; and after giving notices to Banarsi Das who represented Shibban Lal, and to Jainti Prasad as representing Munna Lal, Nawal Kunwar instituted on 24th September 1898 the present suit, to recover the sum of Rs. 8,337-9-0 with interest by sale of the mortgaged property. That sum was arrived at by deducting

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from Rs. 10,000 the amount not paid to Shibban Lal. The defendants to the suit were Bakhtawar Singh and Risal Singh heirs of Partab Singh; Jainti Prasad and Shiam Sundar heirs of Munna Lal; Banarsi Das heir of Shibban Lal, and Dalip Singh purchaser from Jainti Prasad.

Dalip Singh did not appear. The sons of Partab Singh filed a written statement asserting that only Rs. 1,000 of the consideration money had been paid, and that the debt was contracted for immoral purposes. The heirs of Munna Lal alleged that the mortgage in suit was fictitious and executed to save Partab Singh's property; while Banarsi Das pleaded that the whole amount due on Shibban Lal's mortgage had not been paid.

The Subordinate Judge held that the debt was not incurred for immoral purposes; but that the plaintiff did not pay the consideration of the mortgage bond "which was therefore a nominal and fictitious deed executed by Partab in favour of Nawal Kunwar to serve some purpose." Without deciding any other issue he made a decree dismissing the suit with costs.

On appeal the High Court (SIR J. STANLEY, KT., C.J., and P. C. BANERJI, J.) reversed the finding of the Subordinate Judge that the mortgage was fictitious, and decided that Nawal Kunwar had advanced the sum of Rs. 8,322-9-0. A decree was accordingly made directing an account of the money actually due to Nawal Kunwar after making due allowance for the mortgage debt due to Munna Lal and Shibban Lal on the mortgages dated respectively 10th January 1889 and 14th July 1885, and directing a sale of the mortgaged property for realization of the amount found due on the taking of the said account.

The portion of the judgment of the High Court setting forth the grounds on which the Subordinate Judge relied in support of his decision that the mortgage was fictitious, and stating the reasons why the High Court thought it genuine, was as follows:—

"The principal question to be determined in the appeal is whether the mortgage in favour of the plaintiff was a fictitious transaction. We have carefully considered the terms of the mortgage-deed. The various provisions contained in it are not such as one would expect to find in a document executed fictitiously for the protection of property, on the contrary they offered clear indications of the genuineness of the transaction. The bond sets forth in detail, and correctly, as the evidence shows, the liabilities of the mortgagors

at the date of the mortgage and provides that those liabilities should be discharged by the mortgagee. It further provides that she should take possession of the mortgaged property from the beginning of the *rabi* crop of 1296 *Fasli* and appropriate the usufruct for the realization of the mortgage money and interest. Then follow detailed provisions as to the mode in which possession is to be delivered and it is provided that in the event of the mortgagors' failure to deliver complete possession or to get mutation of names effected the mortgagee would be entitled to charge compound interest, not at the rate originally agreed upon but at the enhanced rate of Rs. 24 per cent. per annum. There are other provisions in the deed which are only consistent with its being a genuine document. The motive alleged for entering into a fictitious transaction is, as already stated, the protection of property from the claims of creditors. We fail to see how that object could be attained by executing a mortgage. It is not shown that besides the debts specified in the mortgage-deed there were any other debts amounting to large sums due by the mortgagors. The value of the property was sufficiently large to cover other liabilities subsequently incurred. The defendants themselves have purchased it for a sum exceeding Rs. 25,000, so that by the execution of a mortgage-deed it was hardly probable that the mortgagors could protect their property. The circumstance upon which the lower court chiefly relies for holding that the mortgage was a fictitious transaction is the fact that on the date of the mortgage in question the mortgagee executed a sub-mortgage of the same property for Rs. 5,000 in favour of Munna Lal, the father of the defendants Nos. 3 and 4. It is provided in the plaintiff's mortgage-deed that the mortgagors should before making any payments to the plaintiffs pay over to Munna Lal all sums due upon his sub-mortgage, and from this provision it is inferred that the present mortgage was in reality a mortgage in favour of Munna Lal and that the name of the plaintiffs was only used fictitiously by Partab Singh. It appears that Munna Lal held a prior mortgage in respect of the property mortgaged to the plaintiff and that a sum of Rs. 3,250 was due to him on that mortgage. It seems that the plaintiff had not sufficient funds in her hands to be able to pay the full amount of the mortgage in her favour. Therefore, simultaneously with the execution of the mortgage-deed in her favour, she executed a sub-mortgage in favour of Munna Lal, for Rs. 5,000, out of which it was agreed that the aforesaid sum of Rs. 3,250 should be set off and the balance of Rs. 1,750, should be paid over to the plaintiff. There is no question that this sum of Rs. 1,750, was actually received by the plaintiff. The mere fact that on the day on which the mortgage in plaintiff's favour was made she executed a sub-mortgage of the property does not in our opinion raise any presumption that the said mortgage was not a genuine transaction. A sub-mortgagee would take every precaution to see that the money advanced by him is properly secured and would require such conditions to be inserted in both the deeds executed on the same date as would preclude the original mortgagor from resisting any claim which the sub-mortgagee might have to bring afterwards and also prevent his mortgagor, that is the original mortgagee, from appropriating the payments made by her mortgagor

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and leaving the sub-mortgage unsatisfied. It is only provisions of that character which we find inserted both in the plaintiff's mortgage-deed and in the deed of sub-mortgage executed in favour of Munna Lal. The provisions upon which the learned Subordinate Judge relies as indicating that the transaction was of a fictitious character so far from showing that the transaction was of that nature raise in our opinion the inference that the mortgage was a genuine mortgage.

"The next circumstance upon which the learned Subordinate Judge places considerable reliance is the delivery of a currency note for Rs. 1,000 to Bhawani Prasad in payment of a part of the money due upon the mortgage-deed held by Shibban Lal, to which reference has been made above. It appears that Rs. 1,000 was paid as a part of the consideration for the mortgage in the plaintiff's favour in the presence of the registering officer by the delivery of a currency note of that amount to the mortgagors. On the day following that of the mortgage the mortgagee paid to Bhawani Prasad Rs. 1,500 on account of Shibban Lal's mortgage. The same currency note which had been delivered to the mortgagors the previous day appears to have been made over to Bhawani Prasad. From this circumstance it is contended that no actual payment of consideration in respect of the mortgage in question was made by the plaintiff and that the currency note which was shown to the Registrar as a part of the consideration was taken back from the mortgagors and made over to one of their creditors. The explanation given on behalf of the plaintiff is that on the day subsequent to that of the registration of the mortgage-deed the mortgagor, Partab Singh, wanted to have the currency note for Rs. 1,000 which he had received the previous day converted into cash; that the plaintiff gave him cash in lieu of the currency note, took it back from him and made it over to Bhawani Prasad in payment of his mortgage. The oral evidence which has been adduced in support of the plaintiff's allegation is not very satisfactory, but it seems to us to be in the highest degree unlikely that if Partab Singh, who was evidently a man of affairs, was executing a ficititious document, he would do an act on the day following that of the execution of the mortgage-deed which would nullify the effect of the document and afford evidence which might be used to show the real nature of the transaction. Why would he cause the number of the currency note which was mentioned in the Registrar's endorsement to be specified in the receipt granted by Bhawani Prasad? It seems to us that the plaintiff's explanation in respect of the currency note for Rs. 1,000 is much more probable than the suggestion on behalf of the defendants. If the transaction was a genuine one, as we believe it to have been, it is not unnatural that Partab Singh, instead of incurring the expense of cashing the currency note by payment of discount, made it over to the plaintiff and received from her the money which she was about to pay to one of the creditors. The plaintiff's allegation on the point is supported to a considerable extent by the evidence of Inayat Ali, a witness for the defendants, through whom payment was made to the prior mortgagees. The learned advocate for the respondent has relied upon two other circumstances as indicating that the transaction was fictitious. The

first circumstance is that the mortgagor did not deliver possession to the plaintiff in accordance with the terms of her mortgage, and that the plaintiff took no steps to obtain possession. The second circumstance to which he refers is that, while in the plaintiff's mortgage-deed the rate of interest provided is 13 annas per cent. per mensem, the interest which she agreed to pay to Munna Lal in respect of the sub-mortgage executed by her was 14 annas per cent. per mensem. A sufficient answer is afforded to both these contentions by the clause in the mortgage-deed of the plaintiff referred to above, which is to the effect that in the event of possession not being delivered, the plaintiff was to get enhanced interest at the rate of 24 per cent. per annum. We have further the fact that for a long period after the execution of the mortgage-deed in the plaintiff's favour, Partab Singh admitted the plaintiff to be a mortgagee from him and treated the transaction as a genuine transaction. The recitals contained in the sale-deed executed by the first two defendants in favour of the defendants 3 and 4 raise a similar inference and show that there was a genuine mortgage in the plaintiff's favour. A third circumstance which seems to us to tell very much in favour of the plaintiff is the fact that the plaintiff was in possession of the documents which were taken back from the creditors of the mortgagors. There is nothing to show that at the time of the institution of the suit there was any collusion between her and the mortgagor defendants. On the contrary, the conduct of Risal Singh, defendant, fully negatives the existence of any such collusion. For the above reasons we are of opinion that the conclusion at which the learned Subordinate Judge arrived as to the nature of the transaction is not warranted by the evidence, and that the mortgage in the plaintiff's favour was a genuine mortgage."

The appellants to His Majesty in Council were Jainti Prasad and Shiam Sundar, the former of whom died pending the application to appeal and his sons Dalip Singh and Tara Chand were substituted on the record as his representatives. On the application of the appellants Muktar Singh, as purchaser of the decree made in favour of Nawal Kunwar, was added as a respondent to the appeal. On this appeal.

Jardine, K. C., and *Ross* for the appellants contended that the Subordinate Judge was right in holding that the mortgage in suit was a fictitious or *benami* transaction. The theory of the High Court as to the mode of payment of the consideration was based on mere probabilities. The High Court admitted that the oral evidence for the respondent was not satisfactory, and that Court should have gone further and have taken into consideration the important fact that the respondent had not tendered her own evidence in support of her case. Nor did the High Court consider other important features in the case, namely, the position in

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which the respondent stood towards Partab Singh, and the fact that the mutation proceedings were fictitious.

De Gruyther, K. C., and *Cowell* for the respondent contended, mainly for the reasons given in the judgment of the High Court, that the mortgage represented a genuine transaction which was valid, and binding on the appellants. The decree of the High Court, by which the claims of all parties to the property in dispute had been justly settled, should therefore be upheld.

Jardine, K. C., replied.

1908, *April 2nd*:—The judgment of their Lordships was delivered by SIR ARTHUR WILSON:—

This is an appeal from a judgment and decree of the High Court at Allahabad, bearing date the 17th November 1902, which reversed those of the Subordinate Judge of Meerut, dated the 23rd December 1899. The substantial question as to which the Courts in India have differed, and which their Lordships have to decide, is whether a certain deed of mortgage, bearing date the 10th January 1889, represents a genuine transaction or a fictitious one.

The mortgagors were one Chaudhri Partab Singh and his two sons, one of whom was then a minor. The subject-matter of the mortgage was land and houses at Meerut. At the time of the mortgage Partab was indebted to several persons, partly on mortgages and partly on other securities, the principal creditors being one Munna Lal, the heirs of one Shibban Lal, and one Kishan Sahai, and it is clear that at that time Partab was in money difficulties.

The mortgage in controversy purports to be in favour of a lady named Nawal Kunwar, for Rs. 10,000. Nawal Kunwar was at that time residing in Partab's house, and she was the sister of his son-in-law.

The transaction of the 10th January 1889, as it appears on the face of the papers, consisted of two parts. First, there was the mortgage now disputed, executed by Partab and his two sons in favour of Nawal Kunwar, according to which the lady, as consideration for the mortgage, was to discharge Partab's debts already referred to, a small previous bond in her own favour, and the costs of the transaction, and to pay over Rs. 1,000 to Partab.

The second part of the transaction purports to be a sub-mortgage by the lady to Munna Lal, who has been already mentioned as a creditor of Partab. It was for Rs. 5,000, out of which Munna Lal was to deduct the amount of his previous claim against Partab, and to pay the balance in cash.

Subsequently, on the 18th July 1896, Partab being dead, his sons sold the mortgaged property to Jainti Prasad, the son of Munna Lal, who was also dead, and on the 18th January 1898, Jainti Prasad sold a portion of the property to one Dalip Singh.

On the 24th September 1898 Nawal Kunwar instituted the present suit in the Court of the Subordinate Judge of Meerut. She joined as defendants, 1 and 2, the sons of Partab, 3 and 4, the sons of Munna Lal, 5, the heir of Shibban Lal and 6, Dalip, the purchaser of a portion already mentioned. The object of the suit was to enforce payment of the plaintiff's claim under her mortgage of the 10th January 1889, by the sale of the mortgaged property. It is clear, therefore, that the parties substantially interested in the contest were, on the one hand, Nawal Kunwar, and on the other hand, the sons and heirs of Munna Lal, and, in a lesser degree, Dalip.

The plaintiff's case at the trial was that the mortgage to her was a perfectly genuine mortgage, and that she paid the greater part of the consideration (the precise amount is immaterial here) partly out of her own moneys and partly by means of the Rs. 5,000 borrowed by her from Munna Lal under the sub-mortgage of the same date. The case on the other side was that the mortgage to Nawal Kunwar was a fictitious transaction, and that the only real transaction on that occasion was a borrowing by Partab of Rs. 5,000 from Munna Lal, the name of the lady being introduced purely *benami*.

The Subordinate Judge found for the defendants, holding the alleged mortgage to her to be *benami*. On appeal the High Court differed from that finding; held the transaction to have been genuine, and gave a decree in the plaintiff's favour.

Their Lordships are of opinion that the decision of the High Court was right. There was some evidence on each side, bearing directly on the character of the transaction, but on

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DALIP SINGH v. NAWAL KUNWAR.

neither side was that evidence wholly convincing. Persons whom one might have expected to be prominent witnesses were not called, and the evidence that was called is open to much adverse criticism. The testimony of one witness is described by the Judge who heard it as being worthless. In determining, therefore, which story is to be accepted, it has been found necessary in India, and it is equally necessary for their Lordships, to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions, and their subsequent conduct.

As their Lordships agree in the conclusion arrived at by the High Court, and substantially in the reasons for that conclusion, it is unnecessary to examine the evidence in détail, but it may be well briefly to indicate the principal considerations which seem to their Lordships to support the case of the plaintiff.

The deed itself contains nothing suspicious. Its recitals show with substantial accuracy Partab's previous indebtedness, and the provisions of the deed are such as one expects to find in a deed embodying a real transaction.

The plaintiff, though a woman residing in Partab's house, was not, in the ordinary sense of the term, a dependent member of his family. She was a person of some independent means, was in the habit of lending money, and lent it to Partab himself not on this occasion only. On the other hand, Partab was in embarrassed circumstances. Only five days after the mortgage in question, he was pressed for payment of Government revenue, and had to borrow Rs. 300 from the plaintiff to pay it. Partab's motive in the disputed transaction must have been to relieve his difficulties; but if regarded as a *benami* tranasction, the mortgage, which was for considerably less than the value of the property would have afforded no present protection against creditors. It was suggested that by the accumulation of interest, at a penal rate, the deed might in time become a protection, but that is a somewhat remote speculation. If regarded as a genuine transaction, the advantages to Partab of what was done are obvious. He secured a diminution in the rate of interest which he had to pay, he obtained the benefit of one consolidated liability in place of a number, and he secured a friendly creditor.

At subsequent dates, Partab and his sons, and those claiming through them, always acknowledged the genuineness of the transaction. Particularly in the conveyance by Partab's sons to Jainti Prasad the mortgage is so recognised. It is true that in that deed it is said that the mortgage had been satisfied, but that is a very different thing from there having been no mortgage at all.

One point of minor importance was raised on the appeal. The High Court, by their decree, whilst giving the plaintiff the right to recover on her mortgage, allowed as against her whatever amount not exceeding Rs. 10,000 might be due under the sub-mortgage to Munna Lal. It was contended that the limitation to Rs. 10,000 was wrong. Their Lordships are of opinion that the limitation was right. That sum was agreed upon on the occasion of the sale by Partab's heirs to Jainti Prasad, and the matter was dealt with on that footing by the substantial defendants in their written statement.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

Appeal dismissed.

Solicitors for he appellants—*T. L. Wilson & Co.*

Solicitors for the respondents—*Ranken, Ford, Ford & Chester.*

J. V. W.

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February 18.

APPELLATE CIVIL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

GOBIND DAS AND OTHERS (PLAINTIFFS) *v.* SARJU DAS (DEFENDANT).*

Act No. IX of 1872 *(Indian Contract Act), section* 25—*Act No. XV of* 1877 *(Indian Limitation Act), section* 19—*Acknowledgment—Promise to pay a time-barred debt.*

Where it is sought to recover a time-barred debt on the strength of a subsequent promise to pay made in writing by the debtor, the document relied on must contain an express promise to pay. A promise to pay cannot be inferred from a mere acknowledgment of the debt. *Maniram Seth* v. *Seth Rupchand* (1) distinguished.

THE facts of this case are as follows:—

The plaintiffs came into Court on the allegation that the defendant, on the 2nd November 1899, executed a document, described as a *sarkhat*, in favour of the plaintiffs' firm in respect of an old debt of Rs. 995-10-0 due by him to the firm, and that in this document he promised to pay the aforesaid sum without interest.

They further alleged that again on the 24th of October 1902, a similar document was executed by the defendant promising to pay the aforesaid debt without interest. The plaintiff sued to recover the amount due under this document. The defendant pleaded that the document sued on was a mere acknowledgment and was not a promise to pay a time-barred debt, and that the suit was not maintainable on the mere acknowledgment.

The Court of first instance (Subordinate Judge of Benares) came to the conclusion, on a consideration of the language of the document which is the basis of the suit, that it was not a mere acknowledgment of a debt, but that it contained a promise to pay the debt without interest and accordingly decreed the plaintiffs' claim. On appeal, the District Judge held that, there being no clearly expressed promise in the *sarkhat*, the plaintiffs were not entitled to succeed, and dismissed the suit. The plaintiffs appealed to the High Court.

Pandit *Tej Bahadur Sapru* and Babu *Lalit Mohan Banerji*, for the appellant.

* Second Appeal No. 1260 of 1905 from a decree of G. A. Paterson, District Judge of Benares, dated the 21st of August 1906, reversing a decree of Aziz-ur-Rahman, Subordinate Judge of Benares, dated the 21st of May 1906.

(1) (1906) I. L. R., 33 Calc., 1047.

Babu *Durga Charan Banerji*, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—The plaintiffs, who are appellants here, come into Court on the allegation that the defendant respondent, on the 2nd November 1899, executed a document, described as a *sarkhat*, in favour of the plaintiffs' firm in respect of an old debt of Rs. 995-10-0 due by him to the firm, and that in this document he promised to pay the aforesaid sum without interest.

The plaint sets forth that again on the 24th of October 1902, a similar document was executed by the defendant promising to pay the aforesaid debt without interest. The plaintiff sued to recover the amount due under this document. The defendant pleaded that the document sued on was a mere acknowledgment and was not a promise to pay a time-barred debt, and that the suit was not maintainable on the mere acknowledgment.

The Court of first instance came to the conclusion, on a consideration of the language of the document which is the basis of the suit, that it was not a mere acknowledgment of a debt, but that it contained a promise to pay the debt without interest. On appeal, the learned District Judge held that, there being no clearly expressed promise in the *sarkhat*, the plaintiffs were not entitled to succeed, and dismissed the suit. The plaintiffs come here in second appeal.

The first plea is that the *sarkhat* in question contains an express promise to pay the debt. We have carefully considered the language of the document, and we cannot find in it any promise to pay. The document no doubt states that up to a certain date so much is due without interest, and it refers to the deposit of the title deeds of a house in lieu of the debt (*badlemen*).

The next plea in the memorandum of appeal is that so long as the intention to pay a time-barred debt is clearly deducible from the language of a document, the creditor can maintain a suit, and it is not necessary that it should contain an express promise to pay. We cannot accept this plea. It is probable that when the defendant executed the document he fully intended to pay the debt due from him, but a suit cannot be based upon an unexpressed intention.

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The learned advocate for the appellants relied strongly upon an expression in the judgment of their Lordships of the Privy Council in *Maniram Seth* v. *Seth Rupchand* (1) where their Lordships say:—"An unconditional acknowledgment has always been held to imply a promise to pay because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do."

If we were to give to this passage the wide meaning contended for and hold that whenever there is a clear acknowledgment of a debt, whether time-barred or not, that is equivalent to a promise upon which a suit may be maintained, the result would be that the effect of the opening words of section 19 would be nullified. That section renders it necessary that the acknowledgment referred to therein must be made before the expiration of the period prescribed for the suit. It is evident that in the case cited their Lordships had no intention of in any way departing from the clear meaning of the language of section 19. In the case before them, the acknowledgment was made before the statutory period had run out and their Lordships say:—"Thus one requisite of section 19 is complied with." Under section 25, sub-section 3 of the Indian Contract Act, a promise made in writing and signed by the person to be charged therewith to pay a barred debt is a good consideration, but there must be a distinct promise and not a mere acknowledgment.

In our opinion, the decision of the Court below is right. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1906) I. L. R., 33 Calc., 1047, at p. 1058.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

1908
March 5.

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* BASHARAT-ULLAH AND ANOTHER (PLAINTIFFS).*

Act No. II of 1899 *(Indian Stamp Act), sections* 40, 44, 48 *and* 56 *et seqq*—*Stamp—Improperly stamped document tendered in evidence—Stamp duty from whom recoverable.*

If a plaintiff produces in Court in support of his claim an unstamped or improperly stamped document, he primarily is the person from whom the requisite stamp duty and penalty may be recovered under section 40 of the Indian Stamp Act, 1899.

THE facts of this case are as follows:—

The plaintiffs produced before the Munsif of Muttra two documents; one was a conveyance, and the other a receipt. They wished the two documents admitted in evidence in support of their claim. Both the documents were documents executed in favour of the predecessor in title of the plaintiffs. The Munsif, being of opinion that the documents were not properly stamped, impounded them and sent them in original to the Collector, under the provisions of section 38, clause (2) of Act No. II of 1899. The Collector, acting under section 40, clause (1) (*b*), of the same Act, required from the plaintiffs payment of the proper duty together with a penalty. The plaintiffs did not pay the penalty, and the Collector put in force the provisions of section 48 of the same Act, and attached certain property of the plaintiffs. Thereupon the plaintiffs brought the suit out of which this second appeal has arisen against the Secretary of State for India in Council asking for the release of the attached property and for damages. The Court of first instance (Munsif of Muttra) ordered the release of the attached property and the decree of that Court was confirmed in appeal by the Judge of the Court of Small Causes, Agra, exercising powers of a Subordinate Judge. Both the Courts concurred in holding that the duty and penalty were not recoverable from the plaintiffs, but from the other parties to the deeds in question. The defendant appealed to the High Court contending that the Courts below had erred in holding that the plaintiffs were not liable to pay the stamp duty and penalty required of them.

* Second Appeal No. 590 of 1906 from a decree of Muhammad Siraj-ud-din, Judge of the Court of Small Causes, Agra, exercising powers of a Subordinate Judge, dated the 4th of May, 1906, confirming a decree of Maharaj Singh Mathur, Munsif of Muttra, dated the 31st of August 1905.

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SECRETARY OF STATE FOR INDIA IN COUNCIL v. BASHARAT-ULLAH.

Mr. *A. E. Ryves* for the appellant.

Babu *Durga Charan Banerji*, for the respondents.

KNOX and AIKMAN, JJ.—The plaintiffs, who are respondents to this second appeal, produced before the Munsif of Muttra two documents; one was a conveyance, and the other a receipt. They wished the two documents admitted in evidence in support of their claim. Both the documents were documents executed in favour of the predecessor in title of the plaintiffs. The Munsif, being of opinion that the documents were not properly stamped, impounded them and sent them in original to the Collector, under the provisions of section 38, clause (2) of Act No. II of 1899. The Collector, acting under section 40, clause (1) (*b*), of the same Act, required from the plaintiffs payment of the proper duty together with a penalty. The plaintiffs did not pay the penalty, and the Collector put in force the provisions of section 48 of the same Act, and attached certain property of the plaintiffs. Thereupon the plaintiffs brought the suit out of which this second appeal has arisen for the release of the attached property and damages. The Court of first instance ordered the release of the attached property and the decree of that Court was confirmed in appeal. Both the Courts concurred in holding that the duty and penalty were not recoverable from the plaintiffs, but from the other parties to the deeds in question. The defendant, namely the Secretary of State for India in Council, comes here in second appeal, and it is contended on his behalf that the Courts below have erred in holding that the plaintiffs were not liable to pay the stamp duty and penalty required of them.

In our opinion, this appeal must prevail. Section 40, clause (1) (*b*), is silent as to the person from whom the payment of the proper duty and penalty is to be required. If the Collector required it from the wrong person, his procedure was open to review, as provided by Chapter VI of this Act. No step was taken to review the Collector's order. Therefore the Collector was acting within the authority given him by section 48 in ordering the attachment. Further, we are of opinion that as it was the plaintiffs who wished the documents admitted in evidence in support of their claim, they are the persons from whom the Collector, in the first instance, can recover the duty and penalty

required before the documents can be admitted in evidence. The provisions of section 44 are important as showing that when any duty or penalty has been recovered from any person in respect of an instrument, and some other person was bound to bear the expense of providing the proper stamp, the person from whom the duty and penalty has been recovered shall be entitled to recover from such other person the amount of the duty and penalty so recovered. We decree the appeal and dismiss the suit with costs in all Courts.

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SECRETARY OF STATE FOR INDIA IN COUNCIL v. BASHARAT-ULLAH.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1908 *March* 10.

AMIR BEGAM (PLAINTIFF) *v.* THE BANK OF UPPER INDIA, LIMITED (DEFENDANT).*

Civil Procedure Code, sections 306, 293—*Execution of decree—Sale in execution—Non-payment by purchaser of deposit required by law—Fresh sale—Claim by decree-holder for difference of price on resale.*

Certain immovable property was put up to auction in execution of a decree and purchased by A. B, but the purchaser did not at once make the deposit required by section 306 of the Code of Civil Procedure, and the property was subsequently—but not "forthwith"—put up again to auction and sold for a considerably less sum to the decree-holder. *Held* that the first sale was not merely irregular, but no sale at all, and that the decree-holder was not entitled to claim against the first purchaser under section 293 of the Code, compensation for the loss resulting on the second sale. *Intizam Ali Khan* v. *Narain Singh* (1) followed.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, for the appellant.

Mr. *B. E. O'Conor*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The facts of this case are these. The Bank of Upper India held a decree for sale of the property of Afzal Shah, Dost Muhammad Khan and Amir Muhammad Khan. In execution of that decree they attached and advertised for sale the property of their judgment-debtors. The plaintiff, Musammat Amir Begam, who is the wife of Afzal Shah, authorized one Haidar Shah to purchase for her out of the property

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* First Appeal No. 29 of 1906 from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 30th November 1905.

(1) (1883) I. L. R., 5 All., 316.

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so advertised for sale, as she alleges, the share which belonged to her husband, but not the shares of Dost Muhammad Khan and Amir Muhammad Khan, in the village of Purwana Mahmudpur. The share of Afzal Shah in this village was sold on the 20th of August 1903 to the plaintiff, and the deposit in respect of the purchase money was duly made and this sale was carried out. With this share we have nothing to do in this appeal. The shares of the other judgment-debtors in this village were put up for sale on the 23rd of August 1903 and were knocked down for a sum of Rs. 20,000. Haidar Shah attended at this sale and was the highest bidder. He represented that he attended and bid at the sale on behalf of the plaintiff. No deposit on account of the purchase money was made. Time was allowed to Haidar Shah to pay the deposit, but he failed to do so, and on the 25th of August 1903, this share of the property was sold for a sum of Rs. 12,500 to the decree-holders, the Bank of Upper India. The Bank then claimed to be entitled to recover from Musammat Amir Begam the amount of the difference in the sale price of the property and the price offered by Haidar Shah, namely, Rs. 7,500. Musammat Amir Begam objected, alleging that Haidar Shah had no authority from her to purchase the property in her name. The Bank then attached her property in execution for the purpose of raising the amount of their claim, and she thereupon instituted the present suit to have it declared that she was not liable to pay the deficiency, and that the defendant Bank was not entitled to recover that deficiency from her, and that her property could not be sold to satisfy the amount.

The Court below held upon the issue as to whether or not Musammat Amir Begam did give authority to Haidar Shah to bid on her behalf in respect of this share of the property, that she had given such authority and dismissed her suit. Hence the appeal which is now before us.

Evidence has been given by Haidar Shah, also by Musammat Amir Begam herself and by two other persons in support of her case. Musammat Amir Begam positively denies that she authorized Haidar Shah to purchase any shares in the property other than the shares which belonged to her husband. Haidar Shah corroborates her as to this. In his evidence he stated that Amir

Begam did not authorize him to make any bid for the property of Dost Muhammad Khan and Amir Muhammad Khan and he says :—" I advanced bids at the request of Ghafur Bakhsh and Burkat Ali Khan." Ghafur Bakhsh is a vakil who is employed by the Bank. Barkat Ali Khan is also an agent of the Bank. He further deposed :—" I caused the name of Amir Begam to be taken down, thinking that she might possibly take the property. Permission had not been given to me. Amir Begam has not executed any general power of attorney in my favour nor has she given me any written authority." Two other witnesses, Ahmad Mir Khan and Prasadi Lal, support the evidence of Haidar Shah and Musammat Amir Begam. No evidence to rebut the case of the plaintiff has been adduced. As Mr. *O'Conor* pointed out, there could not very well be any evidence procurable, seeing that there was no written authority given by the plaintiff to Haidar Shah. He did not act under any power of attorney, and, so far as the evidence goes, save and except that he was asked by Musammat Amir Begam to purchase some of her husband's property on her behalf, there is no evidence before the Court other than that to which we have referred. On this evidence, if we consider it trustworthy, the plaintiff was entitled to a decree.

The learned Subordinate Judge has, however, rejected it, and upon the following grounds. On the 2nd of September 1903 Musammat Amir Begam, together with Haidar Shah, who was entitled to certain shares in the property of Sardar Bahadur, Mir Khan and her husband Afzal Khan, executed a mortgage in favour of one Badri Prasad to secure a sum of Rs. 9,250. This money was borrowed for the purpose of satisfying the purchase money of property which had been purchased at the sale in question by Haidar Shah on behalf of Musammat Amir Begam. In addition to the shares of Afzal Shah in the village of Purwana Mahmudpur, Haidar Shah purchased for Musammat Amir Begam several bits of land of small value, one in Nayagaon and another in Kajraut. No authority apparently was given by Musammat Amir Begam for the purchase of these small properties, but she appears to have acquiesced in the act of Haidar Shah in making the purchases and paid the amount of the deposit and also the balance of the purchase money. The learned

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Subordinate Judge was of opinion upon a perusal of this document that Musammat Amir Begam must be taken to have authorized Haidar Shah to purchase other properties than those which are referred to in this document. He says, referring to this deed:—"She admitted that she had borrowed money from Badri Das to deposit the sale price. She admitted that Haidar Shah purchased for her Afzal Shah's share in Purwana and also *hakiats* in Kajraut and also in the town of Kila and in other villages," and he also says that "the properties so purchased, including *bist biswa* mauza Purwana Mahmudpur, were mortgaged by Amir Begam herself in this deed." We have carefully read the deed, and it appears to us that the learned Subordinate Judge has to some extent misunderstood its terms. The first recital in the deed runs as follows:—"We have borrowed from Seth Badri Das, son of Seth Lala Har Nath Rai, * * * Rs. 9,250 in cash, etc., for payment of the purchase money of the property in mauza Purwana Mahmudpur, etc., being the property of Agha Syed Afzal Shah aforesaid and Agha Syed Dost Muhammad Khan and Amir Muhammad Khan, relations, which was sold by auction from the 20th to the 22nd of August 1903 by the Revenue Court at Bulandshahr in satisfaction of the amount of the decrees held by the Bank of Upper India, Limited, Meerut, and which I, Musammat Amir Begam, have purchased through my relations Agha Syed Haidar Shah and others." Then in the operative part the mortgagors purport to hypothecate amongst other properties the entire village of Purwana Mahmudpur, that is 48 *sihams* out of 192 *sihams*. The learned Subordinate Judge treated the recital that the money which was borrowed was borrowed for the purpose of paying the purchase money of the property in Purwana Mahmudpur, which belonged to Afzal Shah, Dost Muhammad Khan and Amir Muhammad Khan, as conclusively showing that Musammat Amir Begam had knowledge of and acquiesced in and ratified the purchase by Haidar Shah of the shares in that village which belonged to Dost Muhammad Khan and Amir Muhammad Khan. It appears to us that this inference cannot be drawn from the document. The money which was borrowed was required for the purchase of not merely the property situate in Purwana Mahmudpur belonging

to Afzal Shah, but also other property belonging not merely to him but also to Dost Muhammad Khan and Amir Muhammad Khan, namely, the property in the village of Nayagaon and in the village of Kajraut, and the statement appearing later on in the document that Musammat Amir Begam had purchased the property, which was so intended to be hypothecated, through Haidar Shah and others, shows that the property hypothecated was that which she had authorized Haidar Shah to purchase. This appears to be indisputable from the fact that at the date of the mortgage, namely, the 2nd of September 1903, the shares which belonged to Dost Muhammad Khan and Amir Muhammad Khan had been put up for sale and sold to the Bank, namely, on the 25th of August 1903. It is impossible to believe that the mortgagors in this mortgage purported to hypothecate property in which they had no interest whatsoever, even if the mortgagee was careless enough to accept the security of property in which his mortgagors had no interest. The language in which the document is couched appears to us to have misled the Court below. It is only on a careful perusal of it that it is apparent that the advance was obtained from the mortgagor to enable Musammat Amir Begam to complete the purchase of her husband's property in Purwana Mahmudpur and the small portions of property in other villages which Haidar Shah had without authority purchased for her. There are other matters which seem to confirm the view which we have formed, and these are that the plaintiff only procured and sent for deposit in Court a sum of Rs. 3,600, that is, the 25 per cent. deposit required by the rules in respect of the purchase of the property of her husband, and further that the amount obtained by her on the security of the 2nd of September 1903 was only a sum of Rs. 9,250, which would have been entirely inadequate to satisfy the purchase, which Haidar Shah purported to make on her behalf. Upon the whole we are clearly of opinion that Haidar Shah had no authority whatsoever from Musammat Amir Begam to purchase the shares of Dost Muhammad Khan and Amir Muhammad Khan, and this being so, the plaintiff's suit ought to have been decreed.

There is a further matter which has occurred to us on the hearing of the appeal, and that is this. Under the provisions of

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section 306 of the Code of Civil Procedure, a purchaser is required to deposit 25 per cent. of the amount of his purchase money immediately after he has been declared the purchaser. The section provides that in default of such deposit the property shall be forthwith put up again and sold. It was decided by a Bench of this Court in the case of *Intizam Ali* v. *Narain Singh* (1) that if a purchaser failed to make the deposit required by this section, no sale whatever could be held to have taken place. Stuart, C.J., in that case held that the sale impugned by the appeal was not bad by reason of an irregularity in its conduct, but that "it was no sale at all, inasmuch as the indispensable conditions of the law, as contained in section 306 of the Code of Civil Procedure, were not fulfilled by the person declared to be the purchaser. The sale took place early in the afternoon of 20th April 1882, and the respondent did not pay a deposit of 25 per cent. on the amount of his purchase immediately after the declaration that he was the purchaser." Then they say:—"In default of such deposit the property should have been forthwith put up again and sold. The order of the Court below confirming the sale was therefore wrong and must be set aside." This is an authority which we are bound to follow. It decides that there was in this case no sale, and therefore no resale such as would justify the claim of the bank made under section 293. There was in fact no resale within the meaning of that section. Therefore upon the merits as well as in view of the provisions of section 306, it appears to us that the plaintiff ought to have succeeded in her suit.

We therefore allow the appeal. We set aside the decree of the Court below and give a decree to the plaintiff in the terms of the relief asked for in the plaint. The defendant Bank must pay the costs of this appeal and also the costs in the Court below.

Appeal decreed.

(1) (1883) I. L. R., 5 All., 316.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

1908
March 10.

NIAZ AHMAD (PLAINTIFF) *v.* ABDUL HAMID (DEFENDANT).*

Civil Procedure Code, sections 43, 373—*Act No XV of* 1877 *(Indian Limitation Act), schedule II, article* 106—*Suit for division of alleged partnership assets—Separate suits for property at different places.*

The plaintiff sued for possession of one-half of certain property in the Moradabad district, alleging that it had been purchased out of the profits of a partnership subsisting between himself and the defendant. Other similar property in Naini Tal was mentioned in the plaint, but the plaintiff said he would bring a separate suit in respect of that property. The first suit was withdrawn, but without permission being granted to bring a fresh suit. Subsequently a second suit was brought in Naini Tal respecting the property there. The plaintiff alleged himself to be in possession of this property, but it was found that he was not. *Held* that the second suit was barred by the operation of section 43 as well as of section 373 of the Code of Civil Procedure, as also, on the finding that the partnership had been dissolved more than three years before suit, by article 106 of the second schedule to the Limitation Act.

THE plaintiff in this case filed a suit in the Moradabad district for the recovery of certain property. He alleged that the property had been acquired by the defendant out of partnership funds, and that it had been dishonestly entered by the defendant in his own name. The plaintiff prayed for a declaration that the property in question was partnership property, and further asked to be put into possession of one half of it. In his plaint the plaintiff mentioned that there was other similar property in Naini Tal, and said that, as he could not legally sue for it in the Moradabad court, he would bring a separate suit for it. The suit filed in Moradabad terminated by being withdrawn without permission under section 373 of the Code of Civil Procedure to bring a fresh suit. The plaintiff then brought a second suit in the court of the Deputy Commissioner of Naini Tal in respect of the property alluded to in his former plaint. Of this property he alleged himself to be in possession and asked for a partition. The Court of first instance found that the plaintiff was not in possession, and dismissed the suit as being barred by the provisions of section 43 of the Code of Civil Procedure and also by article 106 of the Limitation Act, and this decree was affirmed in appeal by the Commissioner. On the plaintiff's application certain questions, which are stated in the opinion of the Court,

* Miscellaneous No. 196 of 1907.

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were referred by Government to the High Court under rule 17 of the Kumaun Rules of 1894.

Pandit *Moti Lal Nehru* and Pandit *Mohan Lal Nehru*, for the applicant.

Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Sundar Lal* for the opposite party.

AIKMAN and KARAMAT HUSEIN, JJ.—This is a reference by Government under rule 17 of the Kumaun Rules, 1894, asking for the report and opinion of this Court on certain questions arising out of an appellate decree of the Commissioner of Kumaun. The case is a difficult one. After hearing it thoroughly and ably argued by the counsel on both sides, we reply as follows:—

In the suit filed in Moradabad, the plaintiff came into Court alleging a partnership between himself and the defendant. He asserted that certain property had been acquired by the defendant out of the partnership funds, and that it had been dishonestly entered by the defendant in his own name. He asked for a declaration that the property in question was partnership property, and further asked to be put in possession of one-half of it. In that plaint he referred to the existence of other property in Naini Tal and said that as he could not legally sue for it in the Moradabad Court, he would bring a separate suit for it. The Moradabad suit was afterwards withdrawn by the plaintiff, no permission being given under section 373 of the Code of Civil Procedure to bring a fresh suit. The plaintiff afterwards filed in the Court of the Deputy Commissioner of Naini Tal the suit which has given rise to this reference. The suit is in regard to property which, according to the statements in paragraph 1 of the plaint and the evidence of the plaintiff, was partnership property as defined in section 253 of the Contract Act. The plaintiff stated that he was in possession of this property and asked for a partition. In his plaint and in his evidence, the plaintiff alleged that he was in possession of the property in suit. The defendant denied that plaintiff was in possession. The Deputy Commissioner found that plaintiff was not in possession, and this finding was not challenged by the plaintiff in his appeal to the Commissioner. The Courts

below held that the suit was barred under the provisions of section 43 of the Code of Civil Procedure and also by article 106 of the Limitation Act.

The first question asked by the Government is—"whether, having regard to the statements in the plaints of the suits filed in Moradabad and Naini Tal, separate causes of action was disclosed, or whether the cause of action in both suits was one and the same?" We have carefully studied the plaints, and in our opinion the cause of action in both suits was in reality one and the same, *viz.*, a claim to property arising out of the relation of the parties as partners in the firm at Naini Tal.

The second question is—"whether, if there was only a single cause of action in both suits, the plaintiff was bound to include the claim for the Naini Tal property in the suit filed in Moradabad, and whether his omission to do so precludes the institution of the present suit?" In our opinion, the plaintiff not only might but ought to have included his present claim in the first suit, and his omission to do so precludes the institution of the present suit.

The third question is—"did the reference to arbitration in the Moradabad suit bar the trial of that suit? If it did, is the present suit affected or not by the provisions of section 43 of the Code of Civil Procedure?" This question appears to be based on some misconception. The parties are agreed that no reference to arbitration was made in the Moradabad suit.

The fourth question is—"does the withdrawal of the Moradabad suit without permission to bring a fresh suit, under section 373, Civil Procedure Code, bar the present suit for the portion of the claim omitted in the previous suit?" Having regard to our answer to the second question, we answer this in the affirmative.

The fifth question is—"is the present suit barred under article 106 of the second Schedule of the Limitation Act (XV of 1877)?" Although the suit is not in terms a suit for a share of profits of a dissolved partnership, it is found by the Courts below that the partnership was dissolved upwards of three years before the suit was instituted in Naini Tal, and as the plaintiff would not have been entitled to the relief he asked for without

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an account and a finding as to his share of the profits of the partnership, we hold that his present suit is barred.

This is our reply to the reference. In our opinion the respondent is entitled to his costs in all courts.

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FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Aikman. *

SADDU (DEFENDANT) *v.* BIHARI SINGH (PLAINTIFF).

Land-holder and tenant—Partition—Rights of tenants in respect of house sites in the abadi.

As the result of the partition of a village hitherto forming one mahal into two mahals the occupancy holding of a tenant fell into one mahal owned by one co-sharer, whilst a house which the tenant and his predecessors in title had occupied for a considerable period as appurtenant to the agricultural holding fell into the other mahal owned by the other co-sharer. *Held* that the partition effected no change in the position of the tenant: so long as he continued in possession of his occupancy holding he could not be ejected from his house in the abadi of the village, nor could he be required to pay rent therefor. *Dharam Singh* v. *Bhoolar* (1) followed. *Sundar Lal* v. *Chajju* (2) distinguished. *Panna* v. *Nazir Husain* (3) doubted.

THIS was a suit brought by one of the zamindars of the village Bharatpur, a hamlet of Darihal, for the ejectment of the appellant, Saddu, from the site of his dwelling house and for a decree directing him to remove the materials of the house or to receive compensation for the value of those materials. The house was situated in a portion of the abadi of the village which had fallen into the share of the plaintiff by partition. The defendant cultivated land in another mahal of the same village, under a different proprietor. The plaintiff sought to eject him from his house on the ground that he refused to pay ground rent for the site of the house. The Court of first instance (Munsif of Moradabad) dismissed the suit, but the lower appellate Court (District Judge) reversed this decree and decreed the plaintiff's claim. The defendant appealed to the High Court. Issues were referred to the lower appellate

* Second Appeal No. 961 of 1905 from a decree of D. R. Lyle, District Judge of Moradabad, dated the 20th of July 1905, reversing a decree of Mohan Lal, Munsif of Moradabad, dated the 2nd of March 1905.

(1) Weekly Notes, 1908, p. 123. (2) Weekly Notes, 1901, p. 142. (3) Weekly Notes, 1902, p. 60.

court, which found that about 30 years ago, that is, about the year 1877, the village lands and sites were divided by perfect partition into two mahals, namely, mahal Chunni and mahal Har Sukh; that at the time of that partition the site of the house occupied by the appellant was allotted to mahal Har Sukh, while the land cultivated by him was allotted to mahal Chunni, and that mahal Har Sukh belongs to the plaintiff, and the other mahal to another proprietor. The Court below further found that before this partition, the house occupied by the defendant was erected, and the land now in his cultivation was held by his predecessor in title; that the defendant and his predecessor in title had occupied the house in dispute for at least 40 years, and that they had been the tenants of the land cultivated by them for at least that period. The Court below also found that, although there was no direct evidence that the site of the house was occupied as part of the contract of tenancy, it might reasonably be presumed that the predecessor of the defendant was permitted by the zamindar to occupy the site to enable him to carry on his cultivation.

On this appeal —

Munshi *Iswar Saran* (for Dr. *Tej Bahadur Sapru*), for the appellant, contended that having regard to the findings on remand the appellant could not be ejected so long as his tenancy was subsisting. Partition between the zamindars could not affect the rights of the tenants—*Dharam Singh* v. *Bhoolar* (1). What all the zamindars in a body could not do, could not be done by the plaintiff alone. A tenant who is allowed to build a house in the abadi for his occupation cannot be turned out so long as he continues to reside in the village and keeps up the house. *Nazir Husain* v. *Shibba* (2), *Raj Narain* v. *Budh Sen* (3), *Sri Girdhariji Maharaj* v. *Chote* (4) and *Dalal* v. *Bhaggu* (5) were cited.

The Hon'ble Pandit *Sundar Lal* (with whom Pandit *Baldeo Ram Dube*) for the respondents :—

The whole question is whether the appellant is entitled to retain the land for ever without paying any rent. It cannot be presumed that the site of the house and the cultivatory holding

(1) Weekly Notes, 1908, p. 123.
(2) (1904) I. L. R., 27 All., 81.
(3) (1904) I. L. R., 27 All., 338.
(4) (1898) I. L. R., 20 All., 248.
(5) (1894) I. L. R., 16 All., 181.

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were granted under one common contract: this allegation, like any other, must be proved by the party making it. The defendant pays rent for the cultivatory holding to the zamindar who now owns that land, but he pays nothing for the use of our land. If both were held under the same contract for payment of one rent, the portion of the rent paid for the use of the site of the house would have been allocated to the plaintiff. This is not so. He is only a licensee of the site of the house, and the license has been legally revoked. The case is governed by the ruling in *Panna* v. *Nazir Husain* (1). If the tenant is a licensee, he can be turned out at any moment. No contract having been proved, it must be assumed that the defendant is merely a licensee.

BANERJI, J.—The suit which has given rise to this appeal was brought by the respondent, who is one of the zamindars of the village Bharatpur, a hamlet of Darihal, for the ejectment of the appellant, Saddu, from the site of his dwelling house and for a decree directing him to remove the materials of the house or to receive compensation for the value of those materials. The house is situated in a portion of the abadi of the village which has fallen into the share of the plaintiff by partition. The defendant cultivates land in another mahal of the same village, under a different proprietor. The plaintiff seeks to eject him from his house on the ground that he refuses to pay ground rent for the site of the house. The Court of first instance dismissed the suit, but the lower appellate Court has reversed the decree of that Court. The defendant has preferred this appeal.

The learned Judge of the Court below has found upon issues referred to him that about 30 years ago, that is, about the year 1877, the village lands and sites were divided by perfect partition into two mahals, namely, mahal Chunni and mahal Har Sukh; that at the time of that partition the site of the house occupied by the appellant was allotted to mahal Har Sukh, while the land cultivated by him was allotted to mahal Chunni, and that mahal Har Sukh belongs to the plaintiff, and the other mahal to another proprietor. The learned Judge has further found that before this partition, the house occupied by the defendant was erected, and the land now in his cultivation was held, by his

(1) Weekly Notes, 1902, p. 60.

predecessor in title; that the defendant and his predecessor in title have occupied the house in dispute for at least 40 years, and that they have been the tenants of the land cultivated by them for at least that period. The learned Judge also holds that, although there is no direct evidence that the site of the house was occupied as part of the contract of tenancy, it may reasonably be presumed that the predecessor of the defendant was permitted by the zamindar to occupy the site to enable him to carry on his cultivation. Upon these findings, which must be accepted in this appeal, it is clear that the house of the defendant is appurtenant to his agricultural holding. So long therefore, as that holding subsists, he is not liable to be evicted from his house. It is true that since the partition of the village, he holds his agricultural holding under a different proprietor from the owner of the abadi in which his house lies, but a partition between co-owners cannot injuriously affect the rights which he possessed before the partition took place. This was the view held in *Dharam Singh* v. *Bhoolar* (1). The learned advocate for the respondent has referred us to two rulings of this Court, which, he contends, support the case of the respondent. Those are the cases of *Sundar Lal* v. *Chajju* (2) and *Panna* v. *Nazir Husain* (3). The first case is clearly distinguishable from the present. In that case a tenant had his dwelling house in one village and his cultivatory holding in another. It was found that he held the land occupied by his dwelling house as a licensee from the plaintiff. It was held that the license could be and had been revoked. The other ruling is no doubt to some extent in favour of the respondent. But with great respect I feel myself unable to follow it. That was a suit by the zamindar to eject certain agricultural tenants from the site of their houses in the abadi on the allegation that they were trespassers and had recently built on land which had lapsed to the zamindar. It was found that the allegation of trespass was false, and that the houses in dispute had been built about 25 years before suit with the implied permission of the then zamindars at a cost of at least Rs. 300. It was held that the defendants were not tenants

(1) (Weekly Notes, 1908, p. 123. (2) Weekly Notes, 1901, p. 43.
(3) Weekly Notes, 1902, p. 60.

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of the land on which their houses stood and that they were not even licensees. If, as found in that case, the defendants built their houses with the implied permission of the zamindars, I fail to see why they could not be regarded as licensees. The grant of a license may be express or implied from the conduct of the grantor (section 54, Act V of 1882), and if there was an implied grant by the owner of a right to do something on his property which would, in the absence of such right, be unlawful, the right so granted would be a license (section 52). In the present case however the defendant is not a licensee merely of the site of his house. He holds it as an appurtenant to his agricultural tenancy and cannot be ejected during the existence of his tenancy. I would allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance, dismissing the suit with costs.

KNOX, J.—I agree with the view taken by my brother Banerji, and also in the order proposed by him. As pointed out by him in his judgment, the learned advocate for the respondent based much of his argument upon the case of *Panna* v. *Nazir Husain* (1). I was one of the judges who decided that case, and as the result of the further argument addressed to us in this case I think that the view taken in that appeal is open to question. It will, however, be sufficient to consider this when a case similar to that arises. In the present case, as pointed out by my brother Banerji, the occupation of the house by the defendant was and is appurtenant to his agricultural holding, and so long as the holding subsists, he is, in the absence of any provision to the contrary, entitled to occupy the house until the agricultural holding is determined.

AIKMAN, J.—I agree with my learned colleagues in thinking that the appeal must succeed.

The appellant is an occupancy tenant in the village of Dharihal. In a partition made at the instance of the co-sharers, his agricultural holding fell to one co-sharer, whilst the site of the house in which he and his predecessors in title had lived for at least forty years fell to the lot of another co-sharer, namely, the plaintiff respondent. The latter demanded ground rent from the appellant for the site of the house, and on the appellant's refusal

(1) Weekly Notes, 1902, p. 60.

to pay, instituted the suit out of which this appeal arises, asking that the defendant be ejected from the site and ordered to remove the materials of the house within a time to be fixed by the Court, or that the plaintiff may be given possession of those materials at a price to be fixed by the Court. The Munsif dismissed the suit. On appeal it was decreed by the District Judge. The defendant comes here in second appeal.

It is clear that the demand of the plaintiff for ground rent was not based on any contract to pay ground rent. The amount of rent which the plaintiff demanded was, it is true, not a large amount, but it was an amount arbitrarily fixed by him. In my opinion the *onus* lies on him to prove that he is entitled to demand ground rent from the defendant, and this he has failed to discharge.

It may, I think, be taken as settled law that before the partition the zamindars as a body could neither have demanded ground rent from the defendant or his predecessor in title, nor have ejected him from his house, and I fail to see how by effecting a partition amongst themselves, they could acquire a right which they did not previously possess when the village was undivided. This view is in accordance with that expressed by Blair J., in *Dharam Singh* v. *Bhoolar* (1) which decision was affirmed in Letters Patent Appeal.

If the view adopted by the learned District Judge were approved, it would place in the hands of zamindars a powerful weapon against their tenants, and would go far to nullify all the enactments of the Legislature for securing fixity of tenure to agricultural tenants.

I may add that I entirely agree with my brother Banerji in his observations regarding the case of *Panna* v. *Nazir Husain* (2), relied on by the learned advocate for the respondent. With all respect for the learned Judges who decided that case, I do not think the decision was right.

BY THE COURT.—The appeal is decreed, the decree of the Court below is set aside, and that of the Court of first instance restored with costs both here and in the Court below.

Appeal decreed.

(1) Weekly Notes, 1908, p. 123. (2) Weekly Notes, 1902, p. 60.

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March 17.

APPELLATE CIVIL.

Before Sir John Stanley Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

GOBIND PRASAD (PLAINTIFF) *v.* GOMTI AND OTHERS (DEFENDANTS).*

Hindu law—Religious endowment—Endowment to take effect after a life estate.

Held that there is no objection to the limitation by a Hindu testator or settlor of a life estate followed by an endowment of property to religious or charitable purposes.

THIS was a suit instituted for the purpose of getting rid of the effect of a certain deed of endowment (*tamliknama*) executed by one Dwarka Prasad on the 2nd of July 1904. The reliefs asked for by the plaintiff were, first, that the appointment of certain persons as mutawallis of the endowed property should be set aside, and, secondly that it might be declared that the dedication of certain property, purporting to be made by means of the (*tamliknama*) in question, was null and void. The court of first instance (Subordinate Judge of Shahjahanpur) dismissed the suit *in toto*. The plaintiff appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

Munshi *Gobind Prasad* and Babu *Sital Prasad Ghosh*, for the respondents.

STANLEY, C.J., and BURKITT, J.—Of the two grounds of appeal pressed before us in argument, the first is that Dwarka Prasad had no power under Hindu law, or under the award of the 28th of May, 1879, to appoint the defendants 2—4 as *mutawallis* of the temple in the pleadings referred to, and that their appointment was invalid. It appears that there were disputes in regard to that temple, and the matters in difference were referred to arbitration. An award was passed on the 28th of May 1879, which provided that Dwarka Prasad should be the superintendent and manager of the temple. There appears to be no provision in the award for the appointment of a successor to him. We only find in it a direction that if any of the representatives of Dwarka Prasad act dishonestly in regard to the management of the temple, another representative should be competent to defray such expenses and manage and supervise the

* First Appeal No. 161 of 1906 from a decree of Kunwar Bahadur, Officiating Subordinate Judge of Shahjahanpur, dated the 30th of April 1906.

endowment. The award further provides that if all the heirs and representatives of the superintendent turn out dishonest, the management should be under the supervision of the Government. Dwarka Prasad, it has been found, was the founder of the temple, and as such he would have an inherent right to appoint successors, in the absence of any express provision for such appointment. We find, as we have said, in the award, no provision for the appointment of a successor, and therefore it appears to us that Dwarka Prasad was entitled, as he purported to do in the *tamliknama* of the 2nd of July, 1904, to appoint superintendents in succession to himself.

The second point raised in appeal was that there was no valid endowment under the *tamliknama* of the 2nd of July, 1904. By that document, Dwarka Prasad reserved to himself a life estate in the endowed property and gave the property after his death to his daughter for her life and after her death, directed that it should be applied on the temple, that is, for the purposes of the existing endowment. It was contended by Mr. *Abdul Majid*, on behalf of the appellants, that the limitation of the property after the life estates was contrary to the Hindu law, and was void. He relied upon the ruling in the well-known Tagore case. We are of opinion that the limitation in this case is in no way contrary to the rule laid down in that case by their Lordships of the Privy Council. There is no objection so far as we are aware to the limitation by a Hindu testator or settlor of a life estate, followed by an endowment of property to religious or charitable purposes. The learned Subordinate Judge was of opinion that the suit was premature, and therefore dismissed it. In that opinion we do not concur, but we think that Gobind Prasad is not entitled to maintain the suit and that it ought to have been dismissed on the merits. We therefore dismiss the appeal with costs.

Appeal dismissed.

1908
March 23.

REVISIONAL CIVIL.

Before Mr. Justice Karamat Husein.

ASMA BIBI (DEFENDANT) *v.* AHMAD HUSAIN AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 551—*Effect of dismissal of appeal—Amendment of decree—Civil Procedure Code, section* 206.

Held that the dismissal of an appeal under section 551 of the Code of Civil Procedure is a decree and supersedes the decree of the Court below. The Court, therefore, which has taken action under section 551 is the only Court which has jurisdiction to amend the decree under section 206 of the Code of Civil Procedure. *Uma Sundari Devi* v. *Bindu Bashini Chowdhrani* (1), *Peary Mohan* v. *Mohendra Nath* (2) and *Munisami Naidu* v. *Munisami Reddi* (3) followed. *Bapu* v. *Vajir* (4) dissented from. *Rudr Prasad* v. *Baijnath* (5), *Thakur of Masuda* v. *The widows of the Thakur of Nandwara* (6), *Kristnama Chariar* v. *Mangammal* (7), *Kistokinker Ghose Roy* v. *Burrodacaunt Singh Roy* (8), *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati* (9), *Murlidhar* v. *Tapeshri Rai* (10), *Royal Reddi* v. *Linga Leddi* (11), *Thakur Takhatsangji* v. *Bai Sundrabai* (12) and *Kushal Chintaman* v. *Supdu Tapiram* (13) referred to.

The facts of the case are the following. In a suit for their shares in the property left by one Aminuddin, deceased, a plaint was presented on behalf of Asma Bibi and others against Ahmad Husain and others in the court of the Subordinate Judge of Jaunpur. The suit was contested by the defendants. The Subordinate Judge of Jaunpur returned the plaint to be presented to the Subordinate Judge of Benares, and on the 8th February 1906 a formal order was framed by the Subordinate Judge of Jaunpur which awarded full costs to Asma Bibi and others. The Judgment-debtors appealed against that order to the High Court under section 588, clause (6), of the Code of Civil Procedure. In the memorandum of appeal objection was taken to the full costs. The High Court dismissed the appeal under section 551, clause (1), of the Code of Civil Procedure on the 24th May 1906.

* Civil Revision No. 18 of 1907 from an order of Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 26th of May 1906.

(1) (1897) I. L. R., 24 Calc., 759.
(2) (1906) 4 C. L. J., 566.
(3) (1898) I. L. R., 22 Mad., 293.
(4) (1896) I. L. R., 21 Bom., 548.
(5) (1893) I. L. R., 15 All., 367.
(6) (1880) I. L. R., 2 All., 819
(7) (1902) I. L. R., 26 Mad., 91.
(8) (1872) 10 B. L. R., 101.
(9) (1888) I. L. R., 16 Calc., 250
(10) Weekly Notes, 1894, p. 46.
(11) (1881) I. L. R., 3 Mad. 1.
(12) Bombay P. J., 1891, p. 58.
(13) Bombay P. J., 1891, p. 239.

Prior to the dismissal of the appeal under section 551, the judgment-debtors had applied to the Court below for the amendment of the decree dated 8th February 1906 under section 206 of the Code as to the full costs. The Court below, after that dismissal under section 551, amended its decree on the 26th of May 1906. One of the decree-holders then applied in revision to the High Court under section 622 of the Code of Civil Procedure on the ground that the Court below had no jurisdiction to amend a decree confirmed by the High Court.

Pandit *Baldeo Ram Dave,* for the applicant.

Mr. *B. E. O'Conor* (for whom Babu *Sital Prasad Ghosh*), for the opposite parties.

KARAMAT HUSEIN, J.—The facts of the case are the following. In a suit for their shares in the property left by one Aminuddin, deceased, a plaint was presented on behalf of Asma Bibi and others against Ahmad Husain and others to the learned Subordinate Judge of Jaunpur.

The suit was contested by the defendants. The learned Subordinate Judge of Jaunpur returned the plaint to be presented to the learned Subordinate Judge of Benares, and on the 8th February 1906 a formal order was framed by the learned Subordinate Judge of Jaunpur which awarded full costs to Asma Bibi and others. The judgment-debtors appealed against that order to the High Court under section 588, clause (6), of the Code of Civil Procedure. In the memorandum of appeal objection was taken to the full costs. A Bench of this Court dismissed the appeal under section 551, clause (1), of the Code of Civil Procedure on the 24th May 1906.

Prior to the dismissal of the appeal under section 551, the judgment-debtors had applied to the Court below for the amendment of the decree, dated 8th February 1906, under section 206 of the Code as to the full costs. The Court below, after that dismissal under section 551, amended its decree on the 26th of May 1906. One of the decree-holders comes to this Court in revision under section 622 of the Code of Civil Procedure on the ground that the Court below had no jurisdiction to amend a decree confirmed by the High Court.

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The question whether the Court below in such a case has or has not jurisdiction to amend its own decree is of much practical importance, and its determination depends upon determining the nature of the dismissal of an appeal under section 551, clause (1). If the dismissal is a decree, it supersedes the decree of the Court below, and that Court has no jurisdiction to amend the decree of this Court, but if the dismissal is an *order* as distinguished from a *decree*, the decree of the Court below is the only decree in existence and that Court can amend it. The Calcutta and Madras High Courts have held that a dismissal under section 551, clause (1), is a *decree*, see *Uma Sundari Debi* v. *Bindu Bashini Chowdhrani* (1), *Peary Mohan* v. *Mohendra Nath* (2) and *Munisami Naidu* v. *Munisami Reddi* (3). The Bombay High Court in *Bapu* v. *Vajir* (4), however, ruled that the dismissal of an appeal under section 551 of the Civil Procedure Code (Act XIV of 1882) leaves the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed, and it remains the decree of the lower Court which can amend it or bring it into accordance with its judgment.

The view is based, not upon any principle, but upon the change of language made in section 551 by section 47 of Act VII of 1888, as appears from the following remarks of the learned Judges. They say:—"The change of language made in 1888 in that section by the Legislature shows, we think, that it was intended that there should be a difference between the results of a dismissal under it and of a confirmation under section 577; as indeed we think, there must be. Dismissing an appeal is, we think, refusing to entertain it, as in the case of an appeal dismissed as being time-barred. Where an appeal is dismissed under section 551, there is no decree of the High Court which can be executed . . ."

To my mind the view taken by the Calcutta and Madras High Courts is more in keeping with the principles on which the law of procedure is based than the view of the Bombay High Court. The dismissal of an appeal under section 551, clause (1) of the Code of Civil Procedure, is a final adjudication upon the rights of the parties to the appeal and is therefore a decree within the definition of that term in the Code.

(1) (1897) I. L. R., 24 Calc., 759.
(2) (1906) 4 C. L. J., 566.
(3) (1898) I. L. R., 22 Mad., 293.
(4) (1896) I. L. R., 21 Bom., 548.

Again the admission of an appeal is a condition precedent to the exercise of the power conferred by section 551, clause (1)—See *Rudr Prasad* v. *Baijnath* (1). The hearing of the appellant or his pleader by the terms of the section is also a condition precedent to the exercise of that power; and if an appeal is dismissed after it has been admitted and heard the dismissal must result in a decree superseding that of the Court below.

A full Bench of this Court in *Thakur of Masuda* v. *the widows of the Thakur of Nandwara* (2) remarks :—" For it was, although a proceeding under section 551 and therefore *ex parte*, of such a nature that judgment upon it against the appellant finally disposed of the case on the merits." The remarks show that an appeal is disposed of under section 551 on the merits. This being the case the dismissal can be nothing but a *decree*.

Besides the appellate Court as soon as it admits an appeal is seised of it—see *Kristnama Chariar* v. *Mangammal* (3)—and the Code of Civil Procedure or any other Act has conferred no power upon such appellate Court in such a case to so refrain from deciding the appeal as to leave the decree of the Court below unsuperseded. " The function of an appellate Court," their Lordships of the Privy Council say, " is to determine what decree the Court below ought to have made. It may affirm, reverse or vary the decree under appeal. In the first case, it leaves the original decree standing, superadding, it may be, an order for the payment of the costs of the appeal or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given "—*Kistokinker Ghosh Roy* v. *Burrodacaunt Singh Roy* (4).

Such being the function of an appellate Court, it cannot refuse to entertain an appeal which has been admitted and in which the appellant or his pleader has been heard, nor can it in such a case leave a decree of the Court below so ' untouched ' as to give it jurisdiction to amend its own decree after the dismissal of the appeal under section 551, clause (1) of the Code. To say that the appellate Court has such a power and that it has been

(1) I. L. R., 15 All., 367; at p. 369.
(2) I. L. R., 2 All., 819; at p. 823.
(3) I. L. R., 26 Mad., 91; at p. 96.
(4) 10 B. L. R., 101; at p. 113.

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conferred upon it by amending section 551 and substituting "dismiss the appeal, etc.," for "confirm the decision of the Court, etc." is more than I can comprehend. To give an appellate Court the power of refusing to entertain an appeal which has been admitted and in which the appellant has been heard and of refraining from passing a decree which should supersede the decree of the Court below is opposed to the objects for which the Courts of appeal are established and cannot be inferred from a slight change made in the language of section 551.

Their Lordships in the case of *Kistokinker*, no doubt, remark that "there may be cases in which the appellate Court particularly on special appeal might see good reason to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable yet not open to examination by reason of the special appeal," and the learned Judges who decided *Venkatanarasimha Naidu* (1) with reference to those remarks say to the effect that the language of the Judicial Committee suggests a distinction between a confirmatory decree and a decree which simply dismisses the appeal. Those remarks, anyhow, cannot be construed to mean that the dismissal of an appeal under section 551, clause (1), is not a decree. The learned Judges who decided *Bapu* v. *Vajir* (2) have themselves conceded that the dismissal under section 551 is a decree. They say:—"Mr. Govardhan argues that the dismissal of the appeal under section 551 is a decree and appealable under section 584. That may be conceded; still it is clearly not confirming the decree of the lower Court." They have, however, drawn a distinction between a confirmatory decree and a decree which simply dismisses the appeal without noticing the results to which the distinction leads. In cases of dismissal under section 551, clause (1), it leads to the existence of two decrees, in one and the same case at one and the same time, *i.e.*—

(a) The decree of the Court below which according to the learned Judges is untouched.

(b) The decree of the appellate Court which simply dismisses the appeal without confirming the decree of the Court below.

(1) 10 Mad., L. J., 260. (2) (1896) I. L. R., 21 Bom., 548.

When an appeal is dismissed as time-barred, it is to be remarked, with due respect to the learned Judges, that the appellate Court in such a case does not passively refuse to entertain it. It actively determines the rights of the parties to the appeal. Such determination being an exercise of the function of the appellate Court gives a fresh starting point of limitation—see *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati* (1) and *Murlidhar* v. *Tapeshri Rai* (2) The learned Judges say that "where an appeal is dismissed under section 551 there is no decree of the High Court which can be executed." If they mean that no decrees as a matter of practice are framed, their reasoning with the utmost respect to the learned Judges, proves nothing. The omission to frame a formal decree cannot establish that the dismissal under section 551 is not a decree. If they mean that the dismissal is not a decree, they with due deference to them, not only beg the question but contradict themselves for they have "conceded" that the dismissal is a decree. There is nothing in the Code of Civil Procedure to prohibit the preparation of a decree when an appeal is disposed of under section 551.

A reference to the printed judgments of the Bombay High Court for 1891, pp. 58 and 239* shows that that Court, adopting

* Judgment in Appeal No. 805 of 1889 from appellate decree—*Thakur Takhatsangji* v. *Bai Sundrabai.*

The District Judge in this case has merely dismissed the appeal from the decree of the Subordinate Judge without giving any reasons for such dismissal. The Madras High Court has held that there should be a judgment and decree in cases dealt with under section 551 as well as in cases dealt with under the latter sections of the Code—see *Royal Reddi* v. *Linga Reddi* (I. L. R., 3 Mad., 1). This view has been adopted by this Court, and a general rule has been issued accordingly for the guidance of the subordinate Courts. We must therefore reverse the decree of the Court below and remand this case for a fresh decree to be passed according to law.

[Printed judgments of the Bombay High Court, 1891, p. 58.]

Judgment in Appeal No. 469 of 1890—*Khushal Chintaman* v. *Supdu Tapiram.*

The acting Judge, Mr. Mascardi, after calling for the record and hearing the appellant's pleader, dismissed the appeal under section 551. The very brief judgment recorded states that the plaintiff had not proved the genuineness of his sale-deed. It is contended here that as no reasons are given for this finding the learned Judge has not complied with the requirements of law. We are of opinion that he ought to have observed the rules made by this Court (printed at p. 27 of the Circular Orders) and thus have given a judgment at greater length and with more discussion of reasons. Cf. *Thakur Takhatsangji* v. *Bai Sundrabai* (P. J. for 1891, p. 58).

[Printed judgments of the Bombay High Court, 1891, p. 239.]

(1) (1888) I. L. R., 16 Calc., 250. (2) Weekly Notes, 1894, p. 46.

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the view of the Madras High Court in *Royal Reddi* v. *Linga Reddi* (1) that there should be a judgment and decree in cases dealt with under section 551, issued a general rule to that effect for the guidance of the subordinate Courts. I, however, presume that these judgments and the general rule as to the framing of decrees in cases dealt with under section 551 were not brought to the notice of the learned Judges who decided *Bapu* v. *Vajir*. Had those judgments and the general rule been brought to their notice they might have arrived at a different conclusion.

For the above reasons I am of opinion that the dismissal of an appeal under section 551, clause (1), is a decree; that it supersedes the decree of the Court below, and that in the case before me the High Court is the only Court which has jurisdiction to amend the decree under section 206 of the Code of Civil Procedure.

I therefore allow the application for revision and set aside the order of the learned Subordinate Judge of Jaunpur amending the decree, dated the 8th February 1906 as to the full costs. I make no order as to costs.

Application allowed.

(1) (1881) I. L. R., 3 Mad., 1.

APPELLATE CIVIL.

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March 28.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BASTI BEGAM (DEFENDANT) *v.* BANARSI PRASAD (PLAINTIFF) AND MUMTAZ AHMAD AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 53—*Mortgage—Assignment of invalid mortgage—Rights of assignee as against mortgagor and subsequent mortgagee for consideration—Maxim—Qui prior est tempore potior est jure.*

On the 23rd of October 1897 one M.A. executed a mortgage of certain property in favour of H. A., which was registered on the 29th of October 1897. This mortgage was found to be fictitious and without consideration, and to have been made solely for the purpose of defeating the creditors of the mortgagor. On the 15th of August 1898 the mortgagee transferred his rights under this mortgage to his wife B. in part satisfaction of her dower debt. It was found that this was a *bonâ fide* transaction and that B. obtained the transfer of the mortgage without any knowledge of its fraudulent character and was a transferee in good faith and for consideration. On the 29th of October 1897 the same property was again mortgaged to one B. P., who accepted the mortgage in ignorance of the existence of the mortgage of the 23rd of October 1897. This mortgage was registered on the 22nd of March 1898. B. P. afterwards brought a suit for sale on his mortgage impleading B. as a defendant, as well as the mortgagor and the prior mortgagee.

Held that B. was entitled to no relief as against B. P., though as against the mortgagor she was entitled to be paid the amount of the consideration named in the deed of transfer in her favour out of the surplus sale proceeds (if any) of the mortgaged property. *Halifax Joint Stock Banking Company* v. *Gledhill* (1) distinguished. *Cockell* v. *Taylor* (2), *Ogilvie* v. *Jeaffreson* (3), *Parker* v. *Clarke* (4), *French* v. *Hope* (5), *Bickerton* v. *Walker* (6) and *Rice* v. *Rice* (7) referred to.

The facts out of which this appeal arose were as follows:—

The plaintiff respondent, Lala Banarsi Prasad, instituted a suit to raise the amount due to him on foot of a mortgage of the 29th of October 1897 by sale of the mortgaged property. There was a prior document of the 23rd of October 1897 purporting to be a mortgage of a portion of the property executed by the mortgagor Mumtaz Ahmad in favour of Husain Ali Khan, the husband

* Second Appeal No. 1227 of 1905 from a decree of E. O. E. Legatt, District Judge of Bareilly, dated the 26th of August 1905, modifying a decree of Prag Das, Subordinate Judge of Bareilly, dated the 28th of September 1904.

(1) [1891] 1 Ch. D., 31.
(2) (1851) 15 Beav. 103.
(3) (1860) 2 Giff. 353.
(4) (1861) 30 Beav. 54.
(5) (1887) 56 L. J., Ch. D., 363.
(6) (1885) L. R., 31 Ch. D., 151.
(7) (1853) 2 Drew, 73.

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of the defendant appellant Musammat Basti Begam. This mortgage was found to have been fictitious and without consideration, and to have been made by Mumtaz Ahmad solely for the purpose of defeating his creditors. But Husain Ali Khan transferred it to his wife Musammat Basti Begam on the 15th of August 1898 in satisfaction of portion of her dower debt, and it was found on issues referred by the High Court for determination to the lower appellate Court that this was a *bonâ fide* transaction and that Musammat Basti Begam obtained the transfer of the mortgage without any knowledge of its fraudulent character and was a transferee in good faith and for consideration. Dower was due to her at the time, and it was in consideration of a portion of the dower so due that the transfer was made.

The mortgage of the 23rd of October 1897 was registered on the 29th of that month, the date of the plaintiff's mortgage, and the plaintiff had no notice of it when he obtained his mortgage. The plaintiff's mortgage was registered on the 22nd of March 1898.

The Court of first instance (Subordinate Judge of Bareilly), decreed the plaintiff's claim and this decree was on appeal confirmed by the District Judge. Both Courts held that as the mortgage in favour of Husain Ali Khan was bad in law his assignee could not derive any benefit from it. Musammat Basti Begam appealed to the High Court.

Messrs. *Abdul Majid* and *G. W. Dillon*, for the appellant.

Mr. *B. E. O'Conor*, the Hon'ble Pandit *Sundar Lal* and Munshi *Gulzari Lal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The question in this appeal was strenuously and ably argued by Mr. *Dillon* on behalf of the appellant, and is one of some nicety and difficulty. The plaintiff respondent, Lala Banarsi Prasad, instituted the suit out of which it has arisen to raise the amount due to him on foot of a mortgage of the 29th of October 1897 by sale of the mortgaged property. There was a prior document of the 23rd of October 1897 purporting to be a mortgage of a portion of the property executed by the mortgagor Mumtaz Ahmad in favour of Husain Ali Khan, the husband of the defendant appellant Musammat Basti Begam. This mortgage is found to have been fictitious

and without consideration, and to have been made by Mumtaz Ahmad solely for the purpose of defeating his creditors. But Husain Ali Khan transferred it to his wife Musammat Basti Begam on the 15th of August 1898 in satisfaction of portion of her dower debt, and it has been found on issues referred by this Court for determination to the lower appellate Court that this was a *bonâ fide* transaction and that Musammat Basti Begam obtained the transfer of the mortgage without any knowledge of its fraudulent character and was a transferee in good faith and for consideration. This is a finding of fact which we must accept in second appeal. Dower was due to her at the time, and it was in consideration of a portion of the dower so due that the transfer was made.

Both the Courts below held that as the mortgage in favour of Husain Ali Khan was bad in law his assignee could not derive any benefit from it. The learned District Judge in his judgment says:—"We may take it that dower was actually due to Musammat Basti Begam and that she was a transferee in good faith, but still I do not think Musammat Basti Begam is entitled to any payment from the plaintiff. Section 53 of the Transfer of Property Act, on which apparently the appellant relies, is not, I think applicable. I take it that the last paragraph can only apply in cases where there is some property capable of being transferred to the transferee in good faith."

The mortgage of the 23rd of October 1897 was registered on the 29th of that month, the date of the plaintiff's mortgage, and the plaintiff had no notice of it when he obtained his mortgage. The plaintiff's mortgage was registered on the 22nd of March 1898.

The question is whether the sham mortgage of the 23rd of October 1897 takes priority of the plaintiff's mortgage by reason of the fact that Musammat Basti Begam took a transfer of it in good faith in satisfaction of part of her dower. Mr. *Dillon* on her behalf relied upon the last clause of section 53 of the Transfer of Property Act, which deals with transfers of immovable property made to defeat, amongst others, the creditors of a transferor, and the last paragraph of it provides that "nothing contained in this section shall impair the rights of any transferee

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in good faith and for consideration." He relied upon the case of *Halifax Joint Stock Banking Company* v. *Gledhill* (1), in which section 5 of 13 Eliz., Cap. V., corresponding to section 53 of the Transfer of Property Act, was considered. In that case, by a settlement which was fraudulent against creditors under 13 Eliz., Cap. V., a reversionary life interest was reserved to the settlor, who subsequently charged his life interest by way of equitable mortgage in favour of a mortgagee who advanced his money without notice that the settlement was fraudulent. It was held in a suit by the creditors to have the settlement declared void that the interest of the equitable mortgagee was protected by section 5 of the Act. In that case the property put into settlement consisted of real estate and a policy of assurance, and these properties were conveyed and assigned to a trustee upon trust for the wife of the settlor for her life, and afterwards for the settlor for life, and subject thereto for the settlor's children. The contention in that case on behalf of the plaintiff was that the mortgagee could have no better title than his assignor unless he could bring himself within the provisions of section 5 of the Act; that he was not a purchaser for value without notice within the protection of that section, as it related only to purchasers claiming directly under the deed which is impeached, and not to persons who subsequently purchased an interest derived under it. Kay, J., held that section 5 includes a purchaser for value without notice of any interest under the deed impeached, whether that interest be legal or equitable, and prevents the deed being void as against such purchaser, and that inasmuch as the mortgagee took a deposit of the settlement from the trustee and settlor, the result was that he obtained such interest as the settlor could give him if the settlement had been valid.

It is to be observed in this case that the impeached document was a conveyance and not a mortgage, and that creditors of the settlor, and not, as in the case before us, a *bonâ fide* mortgagee, were the plaintiffs. Only one or two cases were cited to us during the argument, but we have had an opportunity since the hearing of looking closely into the authorities. In the case of

(1) [1891] 1 Ch. D., 31.

Cockell v. *Taylor* (1) the facts were these. One Collett executed a mortgage of a portion of a fund in Court in favour of one Preston. Preston obtained an advance from Taylor on the security of the mortgage. The mortgage was found to be fraudulent and void as between the parties to it, but Taylor was not at all cognizant of any fraud or irregularity having been practised on the mortgagor. He had no notice of anything doubtful or questionable in the transaction creating the mortgage and his contention was that he was entitled to hold the original mortgage security as valid to the extent of the moneys advanced by him on the security. On the other hand it was contended that the rule of equity is that a man who purchases a chose in action does so subject to all the equities which attach to it, and consequently Taylor bought the interest which was assigned to him subject to the possibility of its being proved thereafter that somebody else had a better title to it than his assignor, or that his assignor's title to it was itself worth nothing. Romilly, M. R., held that the sub-mortgage was void. In his judgment he remarks:—"It has not been disputed nor can it be doubted that the purchaser of a chose in action does not stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title, but takes the thing bought subject to all the prior claims upon it. If therefore the share of the plaintiff Collett in the fund in Court had been charged with a sum to another person unknown to Taylor, Taylor would have taken this interest in the fund subject to that charge. The question here raised arises from the circumstance that the prior equity is an equity in the assignor of the chose in action to dispute and set aside that assignment on the ground of fraud; and it is suggested that, although there be not any doubt or question as to the general rule, yet that this must be taken with some qualification when the person himself who asserts the equity has created the interest under which the assignee of the chose in action claims it. But I have not come to that conclusion. I cannot on this ground draw any distinction between the different sorts of equities affecting a chose in action or alter their priorities. Assuming as I do for the purpose of this present argument that the plaintiff Collett has a prior equity to

(1) (1851) 15 Beav., 103.

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this chose in action, and that the title to it of the person through whom Taylor claims is either void or subject to that of the plaintiff, the circumstance that the plaintiff has been induced to create or countenance such title by instruments which the Court holds to be void, will not in my opinion postpone or alter his original title. In saying this and in assuming that the plaintiff has this equity now subsisting, it is obvious that I must for that purpose assume that the conduct of the plaintiff has not affected this right, which is a question still remaining to be considered; but, assuming that I am right in my decision that the original mortgage of December 1848 is void as against the plaintiff, and that he has done nothing to countenance any subsequent dealing with it, I am of opinion that third persons cannot, by innocently dealing with the person who improperly obtained the mortgage, acquire any equity against the plaintiff." This was a mortgage of a fund; but it seems to us that the same principle is applicable to a mortgage of land as to a mortgage of personal estate. In equity a mortgage is in fact no more than a debt the payment of which is secured by the hypothecation of movable or immovable property.

In the case of *Ogilvie* v. *Jeaffreson* (1) the facts were these. The plaintiff James Ogilvie, who was the mortgagee of four leasehold houses, was fraudulently induced by his solicitor to execute certain deeds, represented to be leases, but by which, in consideration of a sum of money never in fact paid, the plaintiff was made to assign the premises by way of sale to a female servant, by whom they were afterwards mortgaged for value to the defendants. Ogilvie filed a bill to set aside these deeds, and the Court held that they were wholly void, and decreed that they be delivered up to be cancelled. The defendants resisted the suit on the ground that they were purchasers for value without notice by a title derived under the deeds which the plaintiff had been fraudulently induced to execute. The Vice-Chancellor in delivering judgment remarked that "the defendants being well aware that the plaintiff had been mortgagee were bound to know all the particulars of his security from which the title offered to them was derived." Referring to the defence of purchase for value

(1) (1860) 2 Giff., 353.

without notice he referred to the case of *Strode* v. *Blackburne* (1), in which Lord Rosslyn stated that such a defence was a shield to protect the possession of property and was not available in any case except to protect the actual possession, and also to the judgment of Lord Eldon in the case of *Wallwyn* v. *Lee* (2) rejecting the doctrine so propounded by Lord Rosslyn and holding that possession by the purchaser was not necessary, provided he purchased from an apparent owner who was actually in possession, and then he pointed out that the defendants could only show that they claim as purchasers for valuable consideration from Catherine Jones (the female servant) who had no possession, nor any apparent possession of anything, and who in the cause disclaimed any ownership or estate in the property which the defendants alleged she mortgaged to them, and then he observes:—"On the whole case it appears that the plaintiffs claimed to be purchasers from one who was in possession of nothing, who was apparent owner of nothing, who could convey nothing, and never received anything, who was merely named as grantee in a deed, the execution of which was obtained by fraud and imposture and without any knowledge by her that she was acquiring anything, or any intention or wish on her part to have or acquire any such estate or interest as the fraudulent deed affects to convey to her." This case has a close bearing on the case before us. The plaintiff in it was not indeed in so strong a position as the plaintiff here.

The ruling in the two cases lastly quoted, as also that in *Parker* v. *Clarke* (3), if it be good law, is decisive, we think of the appeal before us. In that case one Cruchley conveyed all his interest under a will to secure a sum of £95. The mortgage was executed while Cruchley was in prison for debt, and the Court came to the conclusion that it was given without consideration and under a promise to release the mortgagor from prison which was never performed. Seven days after the execution of this mortgage Thomas transferred it to the defendant Clarke, who had notice of the circumstances under which it had been obtained, and some years afterwards Clarke deposited the mortgage and transfer

(1) (1796) 3 Ves., 222. (2) (1803) 9 Ves., 24.
(3) (1861) 30 Beav., 54.

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with one Philips to secure the payment of moneys due and to become due to him. Philips had no notice of the circumstances under which the mortgage had been obtained. A bill was filed against Clarke and Philips for a declaration that the mortgage deed was void and for an order for its delivery up to be cancelled. On behalf of the plaintiff it was contended that the deed was void and Philips having a mere equitable title to what might be due on the mortgage could only claim such interest as Clarke was entitled to. On behalf of Philips it was argued that he was a purchaser for valuable consideration without notice and that he was entitled to hold the deed until he had been paid what was due to him; that the mortgagor having enabled Clarke to obtain money on the faith of this deed could not set it aside without paying what had been actually advanced on it by Philips. Sir John Romilly, M. R., held that, no consideration having been given for the mortgage, as against Clarke, it must be delivered up to be cancelled, and with respect to Philips that he could only take what Clarke had given him and could not be in a better position than Clarke himself; that Philips must deliver up the deeds and that his only remedy would be against Clarke.

Kekewich, J., dissented from this ruling in the case of *French* v. *Hope* (1) the facts of which were as follows. In April 1883 the plaintiff in order to raise money executed in favour of his solicitor Hope a mortgage in fee to secure £200, a receipt for that sum being endorsed, but no money having been paid to the plaintiff. A few months afterwards the mortgagee deposited the mortgage and title deeds with Messrs. Shum, Crossman & Co. to secure an advance of £100 to himself, Messrs. Shum, Crossman & Co. having no knowledge of the circumstances under which the mortgage was obtained by Hope. It was held that as between the plaintiff French and Shum, Crossman & Co. the equity of the latter must prevail and that they were entitled to rely upon their security for the £100 and interest. In his judgment Kekewich, J., referring to the case of *Parker* v. *Clarke*, said that he must hold that it was overruled by the decision of the Court of Appeal in *Bickerton* v. *Walker* (2). The facts of that case were these:—On the 10th of February 1879 the

(1) (1887) 56 L. J., Ch. D., 363. (2) (1885) L. R., 31 Ch. D., 151.

plaintiffs mortgaged to one Bates for £250 their equitable interest in a sum of stock and also certain policies of assurance, and in the mortgage deed acknowledged the receipt of £250 and also signed a receipt for that sum endorsed on the mortgage deed. On the 11th of March 1879 Bates transferred the mortgage to Hunter, who gave full value for it as a mortgage for £250 and had no notice that the plaintiffs had not received that sum. The plaintiffs brought their suit alleging that they had only received £91, and not £250 and asked for redemption on payment with interest of what they had actually received. It was held that as against Hunter, who had no notice that the whole £250 had not been advanced, the account must be taken on the footing of its having been advanced, for that in the absence of any circumstances to cause suspicion, he was entitled to rely on the acknowledgment contained in the mortgage deed and the endorsed receipt, and had a better equity than the plaintiffs, who, by leaving the documents in the hands of Bates, had enabled him to commit a fraud. Bacon, V.C., held that the account was to be taken on the footing of £250 having been advanced to the plaintiffs. An appeal was preferred which came before Sir James Hanen and Bowen and Fry, L.J.J., and on behalf of the appellants it was contended that a mortgage can only be enforced by a transferee to the same extent as it might be enforced by the original mortgagee and that a transferee takes subject to the account between the mortgagor and mortgagee. The Court dismissed the appeal. Fry, L.J., in delivering the judgment observed:—"He (Hunter) must on the evidence before us be taken to have advanced his money on the faith of the production of the mortgage deed and receipt signed by the plaintiffs and if the assignment by the plaintiffs had been not a mortgage but an absolute conveyance, it would, we think, have been clear that there would have been no negligence whatever on the part of the defendant Hunter in not enquiring of the plaintiffs as to their rights or claims. But it has been argued before us that there is a wide difference in this respect between a mortgage and an absolute conveyance, because, it is said, and said truly, that in the ordinary course of business a prudent assignee of a mortgage before paying his money requires either the concurrence

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of the mortgagor in the assignment or some information from him as to the state of accounts between mortgagor and mortgagee. The reason of this course of conduct is however in our opinion to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor." Then he points out that in the case before them the assignment was executed soon after the execution of the mortgage, and before the time for payment had arrived and that it was not probable that any payment would have been made either of principal or interest in the meantime, and that the transferee was justified in relying upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed, upon the possession of that deed by the mortgagee and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor. Now we may point out that in this case there was a valid and binding mortgage, the only matter in dispute being the amount payable to the transferee under it; also that the competition was between the mortgagors and a transferee from the mortgagee. The Court held that the conduct of the mortgagors, in acknowledging in the mortgage the receipt of the entire mortgage debt and giving a receipt for it, precluded them from raising the case that the entire amount of the mortgage had not been advanced. They followed the general lines laid down by Kindersley, V. C., in *Rice* v. *Rice* (1) and say :—" For the solution of the particular question which distinguishes this case from that, *viz.*, whether there is for this purpose any difference between a mortgage and an absolute conveyance, we have not been aided by any authority cited to us at the Bar." *Parker* v. *Clarke* was cited in this case, but we find no reference to it in the judgment, much less any adverse comment upon the ruling in it. In *Rice* v. *Rice*, the case referred to by Fry, L. J., a vendor conveyed certain property without receiving the purchase money, but a receipt for it was endorsed on the deed and the title deeds were delivered

(1) (1853) 2 Drew, 73.

over to the purchaser. The purchaser then made a mortgage by deposit and absconded, and it was held as between the vendor's lien for his unpaid purchase money and the right of the mortgagee that the possession of the title deeds, and the fact of the endorsement of the receipt on the deed gave the mortgagee the better equity. In his judgment Kindersley, V.C., observed:—"Upon a comparison then of the conduct of the two parties and a consideration of all the circumstances of the case and especially the fact of the possession of the deeds which the mortgagee acquired with perfect *bona fides* and without any wrong done to the mortgagors, I am of opinion that the equity of the mortgagees is far better than that of the vendor and ought to prevail." The two cases therefore lastly referred to were decided after weighing the conduct of the parties and the equities arising therefrom. In *Bickerton* v. *Walker* there was a valid mortgage. In *French* v. *Hope* the mortgagor was estopped by his conduct from relying on the want of consideration for the mortgage as against the sub-mortgagee. In the case before us the defendant appellant derives her title under a sham and fictitious document purporting to be a mortgage. At the date of the execution of the mortgage of the 29th of October 1897 in favour of the plaintiff she had no interest in the property, and her husband also took none under the fraudulent mortgage made in his favour. It does not appear that Musammat Basti Begam made any inquiry of the mortgagor when she took the assignment, and previous to that date the plaintiff had obtained his security, and this security had been duly registered. Husain Ali Khan had not at any time any interest in the mortgaged property. He had nothing to convey to his wife. The equity, if any, which sprung up in her favour when she took the transfer was against the mortgagor Mumtaz Ahmad. She had no equity against the innocent mortgagee Banarsi Prasad whose mortgage was prior in date to the transfer in her favour. Even if *Parker* v. *Clarke* is to be treated as overruled, the appeal ought not, we think, to prevail. The plaintiff's equity is prior in date to that of the defendant appellant, and on the principle *qui prior est tempore potior est jure* the plaintiff has, we think, the better equity.

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The transfer of the fictitious mortgage to Musammat Basti Begam, notwithstanding that it was made *bonâ fide* and for valuable consideration, did not, we think, validate the security as against the plaintiff. Basti Begam took the transfer subject to all defects in the title of her transferor and cannot in equity set up the fictitious document against a *bonâ fide* mortgage. The fictitious instrument received, we think, no new force against the plaintiff from the transfer. The *proviso* to section 53 of the Transfer of Property Act, which was relied on by Mr. *Dillon*, does not appear to us to help his client. That proviso was intended to safeguard rights which have been already acquired. A purchaser for value must be the purchaser of something. Husain Ali Khan had no interest in the mortgaged property under the fictitious mortgage made to him. He had nothing therefore which he could transfer to his wife, and if the latter had made inquiry of the mortgagor she would probably have learnt that the mortgage was fictitious and colourable. On the main question therefore the appeal fails.

It remains to consider whether Musammat Basti Begam has any remedy against Mumtaz Ahmad. In the third ground of appeal she claims that some relief should have been given to her as against him. This point was not specifically dealt with at the hearing. We are disposed to think, upon the principle laid down in *Bickerton* v. *Walker*, that if she desires to enforce the fictitious instrument as against Mumtaz Ahmad the mortgagor she is entitled to do so. He by his fraudulent act placed it in the power of Husain Ali Khan to defraud his wife, and as against her Mumtaz Ahmad cannot be heard to say that the mortgage was fictitious and colourable. We therefore think that if there be any balance out of the proceeds of the sale of the mortgaged property after satisfying the claim of the plaintiff and all prior charges, such balance should be applicable to payment of the amount of the consideration named in the transfer made in favour of Musammat Basti Begam with interest. Possibly the lower appellate Court intended to give her this relief, for we find in the decree a direction that the balance of the proceeds of sale after payment of the sum found due to the

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IN THE MATTER OF THE PETITION OF KHALIL AHMAD.

"therefore invalid" may lead persons to think that in our opinion a grant known as an *ariat* in Muhammadan law is invalid, we think the matter should be considered by us. Speaking for myself I think the word "invalid" erroneously crept into the judgment. What we meant to hold, and did hold, was that the transfer was not an absolute gift so that any limitation or condition limiting it would be void under the Muhammadan law, but that taking the transaction as a whole it was a grant of the usufruct of the property to Musammat Habib-un-nissa for her life. This is what is known in Muhammadan law as an *ariat* (*vide* Ameer Ali's Muhammadan Law, p. 79). An *ariat* is not invalid according to Muhammadan Law, and we did not mean to hold that the transfer in the present case being an *ariat* was invalid. All that we intended to decide was that it was not an absolute gift, but was what is known to Muhammadan law as an *ariat*. In order to remove all misconception I think the words "therefore invalid" should be expunged from the judgment and I would order accordingly.

RICHARDS, J.—I also think that an inaccurate expression has crept into the judgment. The suit was brought to recover possession of certain property. The plaintiffs claimed as heirs of Niaz Ali. The defendant defended the suit as transferee of Musammat Habib-un-nissa, wife of Niaz Ali. Niaz Ali had made an application in the Revenue Court for mutation of names in favour of Musammat Habib-un-nissa. The defendant claimed that the result of that application in the Revenue Court was to confer an absolute estate on Musammat Habib-un-nissa, at least this was the only contention in the appeal before us. We had therefore to decide only the question whether Musammat Habib-un-nissa had acquired an absolute estate. We decided that the transaction amounted to no more than a grant of an *ariat* to Musammat Habib-un-nissa, and that accordingly the defendant could not rely on a transfer from Musammat Habib-un-nissa as a complete transfer of the entire estate in the property. We intended to decide that question and no other, and if the judgment is corrected in the way pointed out by my learned brother it will be free from all ambiguity. I therefore concur in the order passed by him.

plaintiff should be paid to the defendant "or other persons entitled to receive the same."

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We direct that the decree be accordingly modified. In other respects, we affirm the decision of the lower appellate Court, and as the appellant has substantially failed in her appeal, we dismiss it, save as aforesaid, with costs.

Decree modified.

MISCELLANEOUS CIVIL.

1908
April 8.

Before Mr. Justice Banerji and Mr. Justice Richards.

IN THE MATTER OF THE PETITION OF KHALIL AHMAD AND ANOTHER.*

Muhammadan law—Gift—Usufruct—Ariat.

Held upon application for review of judgment in the case of *Mumtaz-un-nissa* v. *Tufail Ahmad* (1) that what was decided in that case was that the transfer there in question was not an absolute gift, so that any limitation or condition limiting it would be void under the Muhammadan law, but that, taking the transaction as a whole, it was a grant of the usufruct of the property to Musammat Habib-un-nissa for her life. It was not intended to be laid down that the transfer being an *ariat* was invalid.

THE facts of this case appear sufficiently from the judgment under review, reported in I. L. R., 28 All. 264 and Weekly Notes, 1905, p. 269, and also from the order on the present application for review.

Mr. *R. Malcomson* for the applicant.

BANERJI, J.—This is an application for a review of the judgment passed by us in this case on 16th November 1905. In that judgment, which is reported in I. L. R., 28 All., 264, the following passage occurs :—"It is manifest that the intention was to transfer to the lady the right to enjoy the usufruct of the property for her life. This under the Muhammadan law would be what is known as an *ariat*, and therefore invalid." It is said that we were wrong in saying in our judgment that an *ariat* is invalid and we are asked to expunge the word "invalid" and substitute for it the word "valid." Strictly speaking, this application for review of judgment is not maintainable under section 623 of the Code of Civil Procedure, as the applicant was not aggrieved by the decree or order passed in the case, but as the expression

* Application for review of judgment in F. A. f. O. No. 80 of 1905, decided on the 16th of November, 1905.

(1) I. L. R., 28 All., 264 ; Weekly Notes, 1905, p. 269.

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BY THE COURT.—We allow the application so far that we direct that the words, "and therefore invalid" be expunged from the judgment. Having regard to the circumstances of the case we make no order as to costs.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir William Burkitt and Mr. Justice Aikman.

RAM BILAS AND ANOTHER (PLAINTIFFS) *v.* LAL BAHADUR AND OTHERS (DEFENDANTS).*

Custom—Finding in favour of existence of custom based upon insufficient evidence—Second appeal—Practice.

Held that where a question arises as to the existence or non-existence of a particular custom, and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence. *Hashim Ali* v. *Abdul Rahman* (1) approved. *Raj Narain Mittar* v. *Budh Sen* (2) referred to.

IN this case the defendants respondents Nos. 2 and 3 sold to the defendant No. 1 their house in mauza Bilsanda, together with its site. The plaintiffs, zamindars of Bilsanda, sued for recovery of possession of the site and for the ejectment of the defendant vendee. The vendee pleaded that Bilsanda was not an ordinary agricultural village, but a town, that the custom of sales and other transfers without the consent of the zamindars prevails in the abadi and therefore the plaintiffs had no title to eject him. The Court of first instance decreed the plaintiffs' claim, finding that the custom alleged was not established, and that the defendants vendors held the house in question as ordinary agricultural tenants and were not entitled to sell more than the materials of it. The vendee appealed. The lower appellate court (additional Judge of Bareilly) reversed the decree of the first Court and dismissed the plaintiffs' suit upon the main ground that Bilsanda was not a village, but a town, to which the ordinary law as to tenants' houses in the abadi was inapplicable. The plaintiffs

* Appeal No. 83 of 1907 under section 10 of the Letters Patent from a judgment of Griffin, J, dated the 19th June, 1907.

(1) (1906) I. L. R., 28 All., 698. (2) (1904) I. L. R., 27 All. 338.

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appealed to the High Court, and their appeal, coming before a Single Judge of the Court, was dismissed. The plaintiffs thereupon appealed under section 10 of the Letters Patent, which appeal was referred to a Bench of three Judges, by order of the Chief Justice dated the 28th March 1908.

Messrs. *R. Malcomson* and *J. Simeon* and Babu *Sital Prasad Ghosh*, for the appellants.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

STANLEY, C.J.—The defendants respondents 2 and 3 were agricultural tenants of the plaintiffs, residing in the village of Bilsanda, and as such tenants occupied the house in the village which is the subject-matter of this litigation. This I take to be the finding of the lower appellate Court. The argument before that Court appears to me to have proceeded on the assumption that the vendors were such tenants of the zamindar, and the question was whether or not a custom which was set up, and to which I shall presently refer, was a binding custom. The defendants respondents 2 and 3 sold the house in question to the defendant No. 1 *together with the site*. The zamindars took exception to the sale of the site and instituted the suit out of which this appeal has arisen for possession of the site of the house. The defence set up was that according to custom the tenants of the village were entitled to appropriate and sell not merely the materials of their houses in the abadi of the village, but also the sites upon which their houses stood, that is, that they could sell the landlord's property. This contention is not supported by the wajib-ul-arz of 1866. In that document provision was made whereby the tenants were permitted to sell or remove the materials of their houses, but nothing whatever is stated in it upon which could be based the suggestion that they could also sell the sites. The wajib-ul-arz is silent as to the sites, and from this silence I draw the inference that a tenant could not under the wajib-ul-arz sell the sites, on the principle *expressio unius exclusio alterius*. The later settlement is silent upon the question of the sale of tenant's houses, and it was the contention in the Courts below that a custom has sprung up whereby tenants in the abadi on leaving their houses can sell and dispose of, not merely the materials of their houses, but also the sites. Instances

of sales were given in evidence, and there is no doubt that a number of documents have been produced in which apparently not merely the fabrics of the houses but the ground also upon which they stood was the subject of sale. We are not aware, however, of the circumstances under which these sales took place. It may be that the landlord had by express agreement with the tenants in the particular cases transferred to them the sites of their dwellings. It may be that the sales were made with the consent of the zamindars. It may be that the sales were made under some special agreement with the tenants made at the time when the occupancy of the houses began. However this may be, it seems to me that the evidence is not such as would justify the Court in holding that so extraordinary a custom as is set up should have been recognized and legalized in this village. In the case of *Raj Narain Mitter* v. *Budh Sen* (1), my brother Knox observed in regard to evidence of this class, namely, sale deeds and mortgages of house property in a village, that "they are at the best only evidence of so many specific instances of transfer and nothing more." Attaching as much importance to such evidence as I find myself able to do, I have come to the conclusion that, even assuming that the custom which was here set up could be upheld by a Court as a valid and legal custom, the evidence in this case is wholly insufficient to establish that custom. I do not express any opinion as to whether such a custom can be regarded as a valid custom. That is a matter upon which it is unnecessary for me to express an opinion. I agree in the view expressed by my brother Richards in the case of *Hashim Ali* v. *Abdul Rahman* (2) that where a question arises as to the existence or non-existence of a particular custom, where the lower appellate Court has acted upon illegal evidence, or on evidence which was legally insufficient to establish an alleged custom, the question is one of law. I regard the question before the Court as one of law and not as one of fact, and therefore hold that we are entitled to consider whether the decision arrived at by the learned Judge of this Court upholding the decision of the lower appellate Court was based upon sufficient evidence. I am pleased to be able to hold that the evidence was

(1) (1904) I. L. R., 27 All., 388. (2) (1906) I. L. R., 28 All., 698.

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legally insufficient, as it appears to me that a grave injustice would be done if the proposition which has been advanced by the learned advocate for the respondents in this case could be held to be good law. I therefore would allow the appeal. I would set aside the decision of the learned Judge of this Court and also the decision of the lower appellate Court and restore the decree of the Court of first instance.

BURKITT, J.—I am of the same opinion. I agree with the learned Chief Justice in the interpretation which he has put on the judgment of the lower appellate Court, and I further fully concur with him in everything he has said as to the very peculiar custom set up by the defendants respondents in this case. I also would restore the judgment of the Court of first instance setting aside the judgments of the learned Judge of this Court and of the lower appellate Court.

AIKMAN, J.—The property in dispute in this case is situated, as is found by the learned Additional Judge, not in an ordinary agricultural village but in a town. I wish to guard myself against saying anything which might be taken as affecting the title of the residents of towns to the houses in which they live. I should have been glad to have had a clearer finding by the lower Court as to the title by which the vendors of the respondent Lal Bahadur acquired the property they sold to him. But assuming that the finding of the learned Additional Judge is, as the learned Chief Justice and my brother Burkitt hold it to be, that the vendors held the property in their capacity of agricultural tenants, I agree in thinking that the evidence relied on by the Courts below as proving a custom whereby such tenants could sell their houses was legally insufficient to establish such a custom. I wish to add that in my opinion it does not follow that, because a resident of a town cultivates land belonging to the zamindar within whose zamindari the site of the town is shown as situated, it necessarily follows that he has no heritable or transferable interest in the house in the town in which he resides. But if it is shown, as I assume to be the case here, that the tenant occupies the house in consequence of and as appertaining to his agricultural tenancy, the onus would lie on him to prove that he had a right to transfer the house. In my opinion in

the present case this onus has not been discharged by the respondent. I therefore concur in the order proposed.

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RAM BILAS v. LAL BAHADUR.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the learned Judge of this Court and also of the lower appellate Court be set aside and the decree of the learned Munsif restored, with costs of this appeal, and also costs in the lower appellate Courts. We extend the time for the removal by the defendant respondent No. 1 of all the materials of the house up to the 15th of May next.

Appeal decreed.

APPELLATE CIVIL.

1908
April 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

ABDUL KARIM KHAN (DEFENDANT) *v.* MAQBUL-UN-NISSA BEGAM (PLAINTIFF) AND MUHAMMAD RAZA KHAN AND ANOTHER (DEFENDANTS).*

Act No. VII of 1889 *(Succession Certificate Act), section* 4—*"Debt"—Deferred dower.*

Held that the dower of a Muhammadan wife, whether prompt or deferred, is a "debt" within the meaning of section 2 of the Succession Certificate Act, 1889, and that in a suit for its recovery brought by the heirs of the deceased wife against the husband no decree can be passed in favour of the plaintiff in the absence of the certificate required by the Act. *Nemdari Roy* v. *Mussummat Bissessari Kúmari* (1) dissented from. *Mahamed Ishaq* v. *Sheikh Akramul-Huq* (2) distinguished. *Webb* v. *Stenton* (3) referred to.

THE plaintiff in this case sued as one of the heirs of Musammat Qadri Begam, the deceased wife of Muhammad Abdul Karim Khan, to recover from the latter her share of the dower debt of Qadri Begam, fixing the amount at a lakh of rupees. The principal defendant resisted the suit upon various grounds; *inter alia* that the defendant had obtained no certificate of succession in respect of the estate of Qadri Begam and that the suit was barred by limitation. The Court of first instance (Subordinate Judge of Moradabad) decreed the plaintiff's claim. The defendant Abdul Karim Khan appealed to the High Court, again urging the two grounds mentioned above.

*First Appeal No. 154 of 1906, from a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 30th of March 1906.

(1) (1898) 2 C. W. N., 591. (2) (1907) 12 C. W. N., 84.
(3) (1883) L. R., 11 Q. B. D., 518, at p.524.

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ABDUL KARIM KHAN v. MAQBUL-UN-NISSA BEGAM.

Mr. *B. E. O'Conor* and the Hon'ble Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru*, Dr. *Tej Bahadur Sapru* and Pandit *Mohan Lal Nehru*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal arises out of a suit brought by the plaintiff, one of the two heirs of Musammat Kadri Begam, the deceased wife of the defendant, for her share of the deferred dower of Musammat Qadri Begam, which became due on her death. The Court below decreed the plaintiff's claim. Of the grounds of appeal only two were pressed before us, one being that the suit was barred by limitation and the other that without the production of a succession certificate the Court below was not justified in passing a decree.

As regards the question of limitation the allegation of the defendant is that Qadri Begam died on the 16th of September 1902, whereas the plaintiff says that she died on the 19th of that month. If she died on the earlier date, the suit, which was not instituted until the 18th of September 1905, is barred. We have carefully considered the evidence of the witnesses who were examined for the respective parties. This evidence is very conflicting. But upon full consideration of it we are quite unable to hold that the learned Subordinate Judge was wrong in the decision at which he arrived. He had the witnesses before him and was in a better position than we are to judge of the credit to be given to their testimony. The evidence of the plaintiff's witnesses is corroborated by an entry of the death in the register of deaths kept at the police station at Chowk at Rampur where Qadri Begam died. Sirajuddin proved this entry, and according to it Musammat Qadri Begam, in the register described as Qazmi Begam, a name by which she was also known, is stated to have died on the 19th September 1902.

The next question is as to the necessity for a certificate under Act VII of 1889. Section 4 of that Act prescribes that "no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof * * * except on the production of (*i*) probate or letters of administration * * *

(*ii*) A certificate granted under section 36 or section 37 of the Administrator-General's Act, 1874 * * * or

(*iii*) A certificate granted under this Act and having the debt specified therein, or

(*iv*) A certificate granted under Act XXVII of 1860 * * * or

(*v*) A certificate granted under the Regulation of the Bombay Code No. VIII of 1827."

Sub-section 2 defines "debt" as including any debt, except rent, revenue or profits payable in respect of land used for agricultural purposes. Debt is therefore used in a very wide sense. The plaintiff has not produced probate, or letters of administration or a certificate as required by the Act. It is contended on her behalf that, inasmuch as the dower in respect of which she sues was deferred dower, it never was payable to Kadri Begam, and therefore her husband was not her debtor within the meaning of section 4. Reliance is placed upon two decisions of the Calcutta High Court as supporting this contention. The first is the case of *Nemdhari Roy* v. *Mussummat Bissessari Kumari* (1) in which it was held that the Succession Certificate Act referred only to debts for the recovery of which the deceased could sue, and that for debts falling due after death an heir may sue without a certificate. O'Kinealy, J., and Rampini, J., in their judgment observed:—"In law we know two kinds of debts; debts which have accrued due and debts not accruing (*sic*) due, but which will be due. Now the Succession Certificate Act refers only to such debts as the deceased could sue upon. The debt in this case has fallen due since the death of the deceased." The learned Judges do not give any reasons for so restricting the meaning of the word debt. We do not find any language in the Succession Certificate Act to bear out the statement that the Act refers only to debts for the recovery of which the deceased could have sued. The language of the Act is quite general and defines a debt within the meaning of section 4 as including "any debt except rent, revenue or profits * * *." Dower, whether prompt or deferred, is a debt due by the husband to the wife, but in the case

(1) (1898) 2 C. W. N., 594.

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of deferred dower is *debitum in praesenti solvendum in futuro.*

The next case is that of *Mahamed Ishaq* v. *Sheikh Akram-ul-Haq* (1). In that case it was held that when a Muhammadan wife, who has not been divorced by her husband, dies during her husband's lifetime, the right to sue for her deferred dower accrues for the first time to her heirs and that the cause of action is not a joint one, but that any of the heirs may sue the husband separately for her share, but that in such a suit the presence of all the heirs is necessary in order effectually and completely to adjudicate upon the claims of the several heirs. We do not find in this case that any reference was made to the Succession Certificate Act. The necessity for the production of a certificate under that Act was apparently not considered.

Now the wife's right to dower, whether prompt or deferred, accrues as soon as her marriage is validly contracted. She can alienate it, pledge it, or make a free gift of it, either to her husband, or to her relations or to third parties. Mr. Ameer Ali in his "Personal Law of the Muhammadans" (2nd Edition, page 392) says:—"Dower is a debt, like all other liabilities of the husband, and has preference over legacies bequeathed by the testator and the rights of heirs. A partition of the estate cannot take place until the dower debt has been satisfied. When the wife is alive she can recover the debt herself from the estate of her deceased husband. If she be dead her representatives stand in her place and are entitled to recover the same." Dower in fact, whether it be prompt or deferred, is a debt due from the husband to the wife. If the dower be prompt, it is presently payable. If it be deferred it is payable in the case of death or divorce—a debt payable in future, but none the less a debt of the husband. It is a debt which accrued due on the completion of the marriage contract, but a debt payment of which is deferred." "The law," said Brett, M. R., "has always recognized as a debt two kinds of debt, a debt payable at the time, and a debt payable in the future." *Webb* v. *Stenton*, (2). Deferred dower is a debt payable in the future. We think therefore that the Court cannot pass any decree in favour of the plaintiff without the production of a

(1) (1907) 12 C. W. N., 84. (2) (1883) L. R., 11 Q. B. D., 518; at p. 524.

succession certificate. But we also think that the plaintiff should have an opportunity, if so advised, of producing such certificate. Accordingly we shall defer passing a decree in this appeal for a period of two months so as to give an opportunity to the plaintiff of obtaining the necessary certificate. We accordingly adjourn the hearing of this appeal for two months.

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ABDUL KARIM KHAN *v.* MAQBUL-UN-NISSA BEGAM.

Before Mr. Justice Sir William Burkitt and Mr. Justice Aikman.

SAMIN HASAN (PLAINTIFF) *v.* PIRAN (DEFENDANT).*

1908 *April* 6.

Civil Procedure Code, sections 574 *and* 551—*Procedure—Appeal summarily dismissed—Court not bound to record a full judgment.*

Held that the provisions of section 574 of the Code of Civil Procedure are not applicable in their entirety to the case of an appeal dismissed under section 551 of the Code. *Rami Deka* v. *Brojo Nath Saikia* (1) dissented from.

THIS was a suit to recover damages for malicious prosecution. The defendant pleaded that the complaint which he had lodged in the Criminal Court was true. The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit, finding that the plaintiff had failed to show that the complaint was groundless. The plaintiff appealed. The lower appellate Court (District Judge of Moradabad) sent for the record and fixed a date under section 551 of the Code of Civil Procedure. Upon that date the Court passed the following order:—"It is admitted that there was, and is, very strong enmity between the parties, and it is just as likely that the appellant had the respondent's house set on fire as that the fire was accidental. The learned Subordinate Judge was right in dismissing the suit. The appeal is summarily dismissed."

The plaintiff appealed to the High Court on the sole ground that the judgment of the Court below was not in compliance with the provisions of section 574 of the Code of Civil Procedure.

Dr. *Tej Bahadur Sapru*, for the appellant.

The respondent was not represented.

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* Second Appeal No. 336 of 1907 from a decree of D. R. Lyle, District Judge of Moradabad, dated the 12th of December 1906, confirming a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 25th of October 1906.

(1) (1907) I. L. R., 25 Calc., 97.

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SAMIN HASAN v. PIRAN.

BURKITT and AIKMAN, JJ.—The appellant brought a suit against the respondent claiming damages for malicious prosecution. The defendant pleaded that the complaint which he had lodged in the Criminal Court was true. The Court of first instance dismissed the suit finding that the plaintiff had failed to show that the complaint was groundless. The plaintiff appealed. The learned District Judge sent for the record, and, after hearing the appellant's pleader, dismissed the appeal summarily under section 551 of the Code of Civil Procedure, giving brief reasons for doing so and coming to the conclusion that the learned Subordinate Judge was right in dismissing the suit. The plaintiff comes here in second appeal.

It is urged that the judgment of the lower appellate Court does not comply with the requirements of section 574 of the Code. The learned advocate for the appellant relies on the decision of the Calcutta High Court in *Rami Deka* v. *Brojo Nath Saikia* (1) as an authority for holding that the provisions of section 574 of the Code apply to a judgment dismissing an appeal under section 551. With all deference to the learned Judges who decided that case, we are not prepared to hold that the provisions of section 574 are applicable in their entirety to the case of an appeal dismissed under section 551. We think this is evident from the immediately preceding sections, and in particular section 571. In the present case it appears that the learned Judge had the record before him and heard the appellant's pleader. There is nothing to show that he did not apply his mind to the facts of the case and the grounds taken before him. We dismiss the appeal, but without costs, as the respondent is not represented.

Appeal dismissed.

(1) (1897) I. L. R., 25 Calc., 97.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husein.

1908
April 24.

NANNHI JAN (DEFENDANT) v. BHURI (PLAINTIFF) AND KARAM ALI KHAN (DEFENDANT).*

Civil Procedure Code, section 283—Suit for declaration of title by person whose objections to execution have been disallowed—Burden of proof.

Held that a party intervening in the execution department, and failing in his objections to an attachment, and consequently being obliged to bring a suit under section 283 of the Code of Civil Procedure, must give *primâ facie* evidence to establish the genuineness of the document upon which he relies. *Tulshi Rai* v. *Ram Das* (1), *Afzal Begam* v. *Muhammad Obaidat-ullah Khan* (2), *Ram Nath* v. *Bindraban* (3) and *Govind Atmaram* v. *Santai* (4) followed. *Suba Bibi* v. *Balgobind Das* (5) discussed.

THE facts out of which this appeal arises are as follows. One Karam Ali Khan had two wives, namely, Musammat Bhuri and Musammat Nannhi Jan. Musammat Nannhi Jan on the 4th of August 1905 instituted a suit against her husband for the recovery of her dower, and on the 24th of November 1905 obtained a decree. On the 2nd of August 1905, that is, two days before the institution of Nannhi Jan's suit, Karam Ali Khan transferred to his wife Musammat Bhuri certain property, ostensibly in satisfaction of a portion of her dower debt. Musammat Nannhi Jan proceeded to execute her decree and attached the property which was transferred to Musammat Bhuri. Thereupon Musammat Bhuri filed an objection, but her objection was disallowed, and thereupon she instituted the suit out of which this appeal has arisen under section 283 of the Code of Civil Procedure.

The first Court (Subordinate Judge of Meerut) dismissed the suit, but upon appeal the District Judge reversed the decision of the Court below and decreed the plaintiff's claim.

The defendant thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Maulvi *Ghulam Mujtaba*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondents.

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* Second Appeal No. 567 of 1907, from a decree of L. Stuart, District Judge of Meerut, dated the 23rd of March 1907, reversing a decree of H. David, Subordinate Judge of Meerut, dated the 17th of September 1906.

(1) Weekly Notes, 1887, p. 71.
(2) Weekly Notes, 1899, p. 220.
(3) (1896) I. L. R., 18 All., 369.
(4) (1887) I. L. R., 12 Bom., 270.
(5) (1886) I. L. R., 8 All., 178.

1908

NANNHI JAN v. BHURI.

STANLEY, C.J., and KARAMAT HUSEIN, J.—This appeal arises under the following circumstances. The defendant Karam Ali Khan had two wives, namely, Musammat Bhuri and Musammat Nannhi Jan. Musammat Nannhi Jan on the 4th August 1905 instituted a suit against her husband for the recovery of her dower, and on the 24th of November 1905 obtained a decree. On the 2nd of August 1905, that is, two days before the institution of Nannhi Jan's suit, Karam Ali Khan transferred to his wife Musammat Bhuri certain property ostensibly in satisfaction of a portion of her dower debt. Musammat Nannhi Jan proceeded to execute her decree and attached the property which was transferred to Musammat Bhuri. Thereupon Musammat Bhuri filed an objection, but her objection was disallowed, and thereupon she instituted the suit out of which this appeal has arisen under section 283 of the Code of Civil Procedure.

The first Court dismissed the suit, but upon appeal the learned District Judge reversed the decision of the Court below and decreed the plaintiff's claim.

The main question which has been discussed before us is whether or not the learned District Judge rightly laid the burden of proof on the defendant Musammat Nannhi Jan. According to his judgment he found, in agreement with the Court below, that the oral evidence was valueless, and held that the decision of the case turned on the amount of value to be placed upon the deed of sale in favour of Musammat Bhuri. Then he says:—"The burden of proof was upon the defendant respondent Musammat Nannhi Jan to prove that the deed had been executed fictitiously and collusively. She did absolutely nothing to satisfy this burden." And later on he observes:—"Musammat Nannhi Jan having absolutely failed to discharge the burden of proof on her to show that the sale deed was executed fraudulently, fictitiously and collusively, I find that the deed of sale in question is a genuine document." It is contended that the learned District Judge regarded the case from an entirely wrong standpoint and that the trial of the case was wholly unsatisfactory. The important fact to bear in mind is that Musammat Bhuri filed an objection to the attachment and to the sale of the property which had been transferred to her and that her objection had been

disallowed. In consequence of this it was necessary for her to institute the suit. It appears to us to be well settled, so far at all events as this Court is concerned, that a plaintiff coming into Court under such circumstances is bound to lay before the Court some evidence to satisfy the Court that the document under which she claims represents a *bonâ fide* and genuine transaction, and that the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. The learned District Judge appears to us to have laid the burden of proof upon the wrong party. In the case of *Tulshi Rai* v. *Ram Das* (1) Straight and Tyrrell, JJ., held that under similar circumstances the burden rested upon the plaintiffs who were impeaching the disallowance of their objection filed in the execution department to establish by clear and satisfactory proof that the property attached was their property at the date of the attachment and not the property of the judgment-debtor. This decision was followed in *Afzal Begam* v. *Muhammad Obaidat-ullah Khan* (2) and also in the case of *Ram Nath* v. *Bindraban* (3). It also has the support of the case of *Govind Atmaram* v. *Santai* (4), which is a case on all fours with the case before us. In that case Sargent, C.J. observes :—" The defendant had obtained an order maintaining his attachment, and it was incumbent upon the plaintiff who impugns that order by the present suit to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase money and that she had been since in possession." These cases establish the proposition that a party intervening, as the plaintiff did in this case, in the execution department and failing in his objections to an attachment and consequently being obliged to bring a suit under section 283 must give *primâ facie* evidence to establish the genuineness of the document upon which he relies. One case was quoted to us in which a different view was taken. That was the case of *Suba Bibi* v. *Balgobind Das* (5). In that case Straight and Brodhurst, JJ., laid the burden upon the defendant. This decision loses weight from the fact that in the later case Straight, J.,

(1) Weekly Notes, 1887, p. 71.
(2) Weekly Notes, 1899, p. 220.
(3) (1896) I. L. R., 18 All., 369.
(4) (1887) I. L. R., 12 Bom., 270.
(5) (1886) I. L. R., 8 All., 178.

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resiled from the position which he took up in it and took part in the decision of the case of *Ram Nath* v. *Bindraban*, which we have cited. Now the learned District Judge has considered the evidence from an entirely wrong standpoint, and it is impossible for us to accept his conclusion on the question whether the sale to the plaintiff was a real transaction or not, in view of the course adopted at the trial. We therefore, as was done in *Govind Atmaram* v. *Santai*, set aside the decree and remand the case to the lower appellate Court for re-trial. We accordingly remand the case with directions that it be replaced in the file of pending appeals in its proper number and be disposed of on the merits, regard being had to the directions which we have given above. The costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

1908
April 30.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

SULTAN BEGAM AND OTHERS (DEFENDANTS) *v.* DEBI PRASAD (PLAINTIFF).*

Act No. IV of 1893 *(Partition Act), section* 4—*Act No. IV of* 1882 *(Transfer of Property Act), section* 44—*"Undivided family"—Section* 4 *of Partition Act applicable to Muhammadans.*

Held that Muhammadans are not excluded from the benefit of section 4 of the Partition Act, Act No. IV of 1893. *Kalka Parshad* v. *Bankey Lall* (1) approved. *Amme Raham* v. *Zia Ahmad* (2) referred to. *Hashmat Ali* v. *Muhammad Umar* (3) overruled.

THIS case was referred by the Chief Justice to a Bench of three Judges for the decision of a point of law arising therein. The facts of the case and the nature of the legal question to be decided appear from the following order of the Bench before which the appeal came on for hearing :—

STANLEY, C.J., and BURKITT, J.—The only question now remaining for determination in this appeal is one as to the true construction of section 4 of the Partition Act, IV of 1893. The suit is one for partition of property situate in Cawnpore, which consists of an enclosed area on which stands an Imambara and

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* First Appeal No. 92 of 1906 from a decree of Prag Das, Subordinate Judge of Cawnpore, dated the 2nd of January 1906.

(1) (1906) 9 Oudh Cases, 158. (2) (1890) I. L. R. 13 All., 282. (3) (1907) I. L. R. 29 All., 308.

also a dwelling house known as Mahal Sarai. The property, it is said, formerly belonged to members of the family of the Nawab Wazir of Oudh. The shares of three members of the family were purchased at three auction sales by a Hindu gentleman, the plaintiff in the suit, who now seeks to have the property partitioned. The defendant Nawab Sultan Begam in her written statement offers, if the Court think that the suit is not barred by limitation and that the plaintiff is entitled to have the property partitioned, to pay to the plaintiff, under the provisions of section 4 of the Partition Act, the value of the share of the property to which he is entitled. On the part of the respondent it is contended that section 4 has no application to Muhammadans, but only to an undivided Hindu family or a family governed by the Hindu law of succession, and relies upon the words in this section "undivided family" as establishing this. Apparently he asks us to introduce the word "Hindu" before the word "family" In the case of *Hashmat Ali* v. *Muhammad Umar* (1) this question came before a Bench of this Court, but the respondents were not represented before the Court. The Court with regret held that section 4 did not apply, except in the case of an undivided Hindu family, and that a Muhammadan could not obtain the benefit of that section. We have serious misgivings as to the correctness of this decision. In a case which came before the Judical Commissioner of Oudh and is reported in 9 Oudh Cases, 156, the Acting Judicial Commissioner held that "the words 'undivided family' must be so interpreted as to include every family, whether it be a Hindu family or otherwise and one which is undivided *quâ* the particular dwelling house, and the words 'dwelling house' must be interpreted to mean not only the house in which the members of an undivided family actually live, but also a house which belongs to the family and in which other members of that family have a right to live if they feel so inclined to do." In view of the importance of the question we think that the issue should be referred to a larger Bench for determination namely, whether or not Muhammadans are excluded from the benefit of section 4 of the Partition Act. We refer the matter to the Chief Justice for the appointment of a larger Bench.

(1) (1907) I. L. R., 29 All., 308.

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The question referred was then argued before a Bench of three Judges.

Mr. *B. E. O'Conor*, Mr. *Abdul Raoof* and Lala *Girdhari Lal Agarwala*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal*, for the respondent.

STANLEY, C.J.—The question which has been referred to us for determination in this case is whether or not Muhammadans are excluded from the benefit of section 4 of the Partition Act, Act No. IV of 1893. This section prescribes that where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family, being a share-holder, shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder. It is contended on the one hand that the words 'undivided family' as used in this section mean a joint family and are confined to Hindus or to Muhammadans who have adopted the Hindu rule as to joint family property. On the other hand the contention is that the expression is of general application and means a family, whether Hindu, Muhammadan, Christian, *et cætera*, possessed of a dwelling house which has not been divided or partitioned among the members of the family. The Act purports to be a general Act extending to the whole of British India, and admittedly sections 2 and 3 apply to Muhammadans as well as to Hindus. Section 2 enables the Court in a suit for partition, in a case in which a division of property cannot reasonably or conveniently be made and in which a sale and distribution of the proceeds would be more beneficial for all the share-holders, on the request of share-holders interested individually or collectively to the extent of a moiety or upwards, to direct a sale of the property. The succeeding section empowers the Court in a case coming within the previous section, if any share-holder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, to order a valuation of the share or shares and to offer the same to such share-holder at the price so ascertained. Then follows the fourth section, and in it we find

nothing to indicate that it was intended to apply to any limited class of the community. The words "undivided family" as used in this section appear to be borrowed from section 44 of the Transfer of Property Act. The last clause of that section prescribes that where the transferee of *a share of a dwelling house belonging to an undivided family* is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the dwelling house. This provision of the Statute is clearly of general application, and the effect of it is to compel the transferee of a dwelling house belonging to an undivided family, who is a stranger to the family, to enforce his rights in regard to such share by partition. There appears to me to be no reason why the words "undivided family" as used in section 4 of the Partition Act, should have a narrower meaning than they have in section 44 of the Transfer of Property Act. If the Legislature intended that section 4 should have limited operation, we should expect to find some indication of this in the language of the section. For example, instead of the words "undivided family" the expression "undivided Hindu family" or "joint family" might have been used.

The question came before a Bench of this Court in the case of *Hashmat Ali* v. *Muhammad Umar* (1), which was a second appeal. The respondent to it was not represented. Our Brothers Knox and Richards in that case held on the analogy of the Full Bench ruling in *Amme Raham* v. *Zia Ahmad* (2) that section 4 did not apply to a Muhammadan family, but they did so with some regret.

In *Amme Raham* v. *Zia Ahmad* it was held that the words "joint family property" in Article 127 of Schedule II of the Limitation Act mean the property of a joint family. In that case the word "joint" which has a settled and well defined meaning is used, and it is in no sense ambiguous. It could not be used as descriptive of property held in common. I fail to discover that there is any analogy between the two cases.

It seems to me that the object of the section, as was pointed out by Mr. Wells, Judicial Commissioner, in the case of *Kalka Parshad* v. *Bankey Lall* (3) is to prevent a transferee of a member

(1) (1907) I. L. R., 29 All., 308 (2) (1890) I. L. R., 13 All., 282.
(3) (1906) 9 Oudh Cases, 158.

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of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live, and that the words "undivided family" must be taken to mean "undivided *quâ* the dwelling house in question, and to be a family which owns the house but has not divided it." It has been pointed out to us that the Partition Act has been extended to Upper Burma under the Upper Burma Laws Act, No. XIII of 1895. Not part of the Act merely, but the whole Act has been so extended. If section 4 was intended by the Legislature to apply to Hindus only or persons who have adopted the Hindu rule of joint family property, it is unlikely that it would have so extended section 4 in view of the fact that there are very few Hindus in Upper Burma.

For these reasons I would reply to the question referred to us that Muhammadans are not excluded from the benefit of the section in question.

BANERJI, J.—I agree and have nothing to add.

AIKMAN, J.—I also concur in the judgment of the learned Chief Justice.

By THE COURT.—The answer of the Court is that Muhammadans are not excluded from the benefit of section 4 of the Partition Act, Act No. IV of 1893.

APPELLATE CIVIL.

1908
April 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

NARAIN PRASAD AND OTHERS (PLAINTIFFS) *v.* MUNNA LAL AND ANOTHER (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Co-sharer—Owner of resumed muafi land.

The pre-emptive clause of a wajib-ul-arz contained the following provision:—*Minjumla malikon-ke agar koi hissadar apni haqqiat bai karne chahe to awwal dusre hissadar sharik haqqiat-ki hath bai karega.*"

Held that the owner of resumed muafi land (which had been resumed before this wajib-ul-arz was framed) in the same khewat as the land sold was entitled to pre-emption as against a vendee who was merely a co-sharer in a different khewat. *Lalta Prasad* v. *Lalta Prasad* (1) referred to.

THIS was a suit for pre-emption. The property sold was a one-third share of a resumed *muafi* holding. The vendee was the holder of *muafi* land in a different khewat of the mahal in which the land sold was situate. The pre-emptors were co-owners with the vendor in the land sold. The claim was based upon the provisions of the wajib-ul-arz, which are set forth in the head-note and in the judgment of the Court. The question at issue was whether the plaintiffs pre-emptors were entitled to pre-empt as "hissadars" by reason of their being owners of resumed muafi lands. The Court of first instance (Munsif of Muttra) decreed the claim, and this decree was on appeal confirmed by the District Judge of Agra. The defendant vendee appealed to the High Court, where the appeal coming before a single Judge was allowed—see Weekly Notes, 1907, p. 173, *Munna Lal* v. *Narain Prasad.* Against this decision the plaintiffs appealed under section 10 of the Letters Patent.

Munshi *Gulzari Lal*, for the appellants.

Pandit *M. L. Sundal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—We have given most careful consideration to the arguments addressed to us by the learned pleaders for the respective parties and have perused the judgment of the learned District Judge and also the judgment of the learned Judge of this Court. It is found that the plaintiffs are

* Appeal No. 46 of 1907 under section 10 of the Letters Patent, from a judgment of Griffin, J., dated the 20th of May 1907.

(1) Weekly Notes, 1881, p. 165.

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co-sharers in resumed muafi land, a portion of which is the subject matter of the sale sought to be pre-empted. This resumed muafi is included in khewat No. 3, in which the plaintiffs are co-sharers, whilst the defendant vendee Munna Lal is not a co-sharer in khewat No. 3, but is a co-sharer in khewat No. 5, with which the land in dispute is not connected, except in the fact that both khewats are recorded as appertaining to the same mahal. The provision of the wajib-ul-arz is that if from among the *malikan* any co-sharer wishes to sell his *haqqiat*, he will first sell the same to a co-sharer in the property (*shariq haqqiat*), and in case the latter refuses to purchase then to anyone he likes. The muafi in question was resumed before the preparation of the wajib-ul-arz in which this provision is found, and it seems to us that the word *malikan* must be taken to include the proprietors of the resumed muafi and that co-sharers of the land in the khewat in which the land sold is situate have a preferential right to pre-empt over co-sharers in land in a different khewat of the resumed muafi. The learned District Judge, who accepted the view entertained by his predecessor in office, appears to us to have correctly appreciated the position of the parties in regard to the property. The learned Judge of this Court has referred to a number of cases, but we find that these cases have little or no bearing upon the case before us. In fact he states in his judgment that they are distinguishable, although he attaches some weight to them. A case which does appear to throw light upon the question is one which was not cited to him, namely, the case of *Lalta Prasad* v. *Lalta Prasad* (1). In that case a somewhat similar question to the one before us was considered. A zamindari village contained a plot of land which at one time had been held on a *muafi* tenure, but had been resumed and had become zamindari. This plot was separately assessed to revenue, but had no separate wajib-ul-arz. A co-sharer in it sold his share to the defendant, a stranger, upon which the plaintiff, a co-sharer in the old zamindari, but not a co-sharer in the resumed muafi, brought a suit to enforce a right of pre-emption, and it was held by Stuart, C.J., and Tyrrell, J., that the lower courts were wrong in limiting the right of pre-emption to the old

(1) Weekly Notes, 1881, p. 165.

zamindari lands and in not extending it to the part of the village, which had formerly been muafi in its tenure. So here, we think the learned Judge of this Court was wrong in not extending to the owners of the resumed muafi the rights which were given to *malikan* generally in the wajib-ul-arz prepared after the resumption of the muafi land and the inclusion of this land in the mahal. We therefore allow the appeal. We set aside the decree of the learned Judge of this Court, and we restore the decree of the lower appellate Court with costs in all Courts.

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NARAIN PRASAD *v.* MUNNA LAL.

Appeal decreed.

REVISIONAL CIVIL.

1908 *April* 11.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

JWALA (APPLICANT) *v.* GANGA PRASAD (OPPOSITE PARTY).*

Act No. I of 1877 *(Specific Relief Act), section* 9—*Criminal Procedure Code, section* 145—*Possessory suit—Effect of order of a Criminal Court—Revision.*

Held that the existence of an order passed under section 145 of the Code of Criminal Procedure is no bar to the institution of a suit under section 9 of the Specific Relief Act, 1877, for recovery of possession of the same land.

Held also that when a suit under section 9 of the Specific Relief Act is decreed the remedy of the defendant lies not in revision but in the institution of a suit for a declaration of the defendant's title and for possession. *Sheo Prasad Singh* v. *Kastura Kuar* (1) referred to.

THE plaintiff in this case sued under the provisions of section 9 of the Specific Relief Act, 1877, to recover possession of a house of which he alleged that he had been forcibly dispossessed by the defendant on the 10th of October 1905. The Court of first instance (Subordinate Judge of Cawnpore) found that the plaintiff was in possession of the house in question up to the 10th of October, 1905, and that upon that date forcible possession had been taken by the defendant, and accordingly gave the plaintiff a decree. It appeared, however, that a Criminal Court had, in proceedings taken under section 145 of the Code of Criminal Procedure, found that at the date of the institution of such

* Civil Revision No. 44 of 1907 from a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 28th of March 1907.

(1) (1887) I. L. R., 10 All., 119.

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proceedings, namely, on the 23rd of October 1905, the defendant was in possession of the house. Against the decree of the Subordinate Judge the defendant applied to the High Court in revision, contending (1) that the proceedings in the Criminal Court above referred to were a bar to a suit under section 9 of the Specific Relief Act, and (2) that after the Criminal Court's order the only remedy of the plaintiff was a Civil Court suit on title.

Mr. *R. K. Sorabji* and Babu *Parbati Charan Chatterji*, for the applicants.

Mr. *Muhammad Ishaq Khan*, for the opposite party.

STANLEY, C.J., and KARAMAT HUSAIN, J.—The suit out of which this application for revision has arisen was brought by the plaintiff under the provisions of section 9 of the Specific Relief Act for recovery of possession of a house, of which, he alleged, he had been forcibly dispossessed by the defendant on the 10th of October 1905. Section 9 of the Specific Relief Act, as amended by Act No. XII of 1891, provides that "if any person is dispossessed without his consent of immovable property, otherwise than in due course of law, he or any person claiming through him may by suit recover possession thereof, notwithstanding any other title that may be set up in such suit," and then follows the proviso that "nothing in this section shall bar any person from suing to establish his title to such property, and to recover possession thereof." The Limitation Act provides that such suit may be brought within six months from the date of the dispossession. It is found by the Court below that the plaintiff was in possession of the house in question up to the 10th of October 1905, and that upon that date forcible possession was taken by the defendant. It appears that proceedings were taken under section 145 of the Code of Criminal Procedure and an investigation was made by the Magistrate for the purpose of ascertaining which of the parties was in possession at the date of the institution of the proceedings, and it is found that at the date of the order of the Court, *viz.*, the 23rd of October, 1905, the defendant was in possession. The Magistrate's duty was confined to the ascertainment of the fact of possession at this time, and beyond this and passing an order declaring the person so

found to be in possession to be entitled to possession until evicted in due course of law, his duty ceased. The language of sub-section (4) of the section is that "the Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements . . . . and if possible decide whether any, and which, of the parties was, at the date of the order before mentioned in such possession of the said subject, etc." Now it is contended on behalf of the applicant that in view of the order of the Magistrate the plaintiff was debarred from taking advantage of the remedy provided by section 9 of the Specific Relief Act and that his only remedy was to institute a suit in the Civil Court to have his title declared and possession given to him. We are of opinion that the criminal proceedings in no way interfered with the right which the plaintiff had under the section of the Specific Relief Act to which we have referred so soon as his possession was interfered with by the defendant. As we have pointed out, forcible possession was taken from him on the 10th of October 1905. We therefore think that the Court below rightly considered the evidence, and having come to the conclusion that the plaintiff was in possession on the 10th of October 1905, and was forcibly ejected from such possession by the defendant, was justified in giving possession to the plaintiff. We should point out that the application in revision was not a proper remedy for the defendant under the circumstances. It has been laid down over and over again that the Court will not interfere in revision where other remedies are open to a party. It was open to the defendant to institute a suit for declaration of his title and for possession, and he is not debarred from doing so by the decree passed under section 9 of the Specific Relief Act. See *Sheo Prasad Singh* v. *Kastura Kuar* (1).

We dismiss the application with costs.

Application dismissed.

(1) (1887) I. L. R., 10 All., 119.

1908
April 23.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Richards.

EMPEROR *v.* TULA KHAN.*

Criminal Procedure Code, sections 123 *and* 397—*Act No. IX of* 1894 *(Prisons Act), section* 3(3)—*Security for good behaviour—Imprisonment on failure to find security—"Sentence."*

Held that where a person is ordered by a Magistrate to be "detained in prison" pending the orders of the Sessions Judge under section 123 of the Code of Criminal Procedure such person must be considered as a person undergoing a sentence of imprisonment and not merely as an under-trial prisoner detained in custody.

Held also that an order for imprisonment on failure to furnish security for good behaviour is a "sentence" within the meaning of section 397 of the Code of Criminal Procedure. *Queen-Empress* v. *Diwan Chand* (1) referred to.

THIS was a reference made by the Sessions Judge of Farrukhabad under the circumstances set forth in the following order:—

"On November 14th, 1907, one Tula Khan was ordered by M. Abdul Jalil, a Magistrate of the first class, to furnish security for good behaviour for the term of three years. The order was not quite in accordance with the procedure laid down in section 123 of the Code of Criminal Procedure, for, while it contained a direction that the case should be submitted to this Court for orders, it also contained an illegal direction that in default of furnishing security the accused should be rigorously imprisoned for three years.

"On November 27th Tula Khan was convicted by M. Mata Badal, a Magistrate of the first class, of an offence under section 332 of the Indian Penal Code and sentenced to two years' rigorous imprisonment, including three months' solitary confinement, and it was ordered that this sentence should take effect at once and that "the sentence which the prisoner is undergoing now" should be carried out after and in addition to the sentence under section 332 of the Indian Penal Code.

* Criminal Reference No. 81 of 1908 made by W. H. Webb, Sessions Judge of Farrukhabad, dated the 20th January 1908, against an order of Abdul Jalil, Magistrate first class of Farrukhabad, dated the 14th of November 1907.

(1) Punjab Rec., 1895, Cr. J., p. 5.

"This order was doubly improper, for in the first place Tula Khan was not undergoing any legal 'sentence' of imprisonment at the time, but was merely being detained in prison pending the orders of this Court under section 123 of the Code of Criminal Procedure, and in the second place M. Mata Badal had no jurisdiction whatever to determine the date from which the so-called sentence should take effect. All that he could do was to direct that the sentence under section 332 of the Indian Penal Code should take effect at once, unless the accused were already undergoing a sentence of imprisonment, in which case the sentence under section 332 of the Indian Penal Code must necessarily (*vide* section 397 of the Code of Criminal Procedure) commence at the expiration of the imprisonment to which the accused had been previously sentenced.

"On December 7th, 1907, this Court approved the order of M. Abdul Jalil directing the accused to furnish security for a period of three years, and ordered that in the event of his failing to furnish the required security he should be rigorously imprisoned for three years with effect from the date of the Magistrate's order. This Court was unaware of the fact that the accused had meanwhile been sentenced to a term of imprisonment under section 332 of the Indian Penal Code. Had it been aware of that fact, this Court, in exercise of the wide powers conferred by section 123 (3) of the Code of Criminal Procedure and in view of the powers conferred on the Magistrate by section 120 (2) of the Code of Criminal Procedure, would have directed that the period for which security was to be given should commence on the expiration of the sentence under section 332 of the Indian Penal Code.

"I now submit the records of both cases to the Hon'ble High Court with the recommendation that the order of M. Abdul Jalil directing Tula Khan to be rigorously imprisoned for three years in default of furnishing security, and the order of M. Mata Badal in regard to the execution of that illegal sentence be set aside as *ultra vires* and of no effect, and that the order of this Court be so modified as to require Tula Khan to furnish security for three years with effect from the expiration of his sentence under section 332 of the Indian Penal Code,

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and in default to be rigorously imprisoned for three years."

The reference was by order of the Chief Justice laid before a Full Bench of the Court for disposal.

The Government Advocate (Mr. *A. E Ryves*), for the Crown.

In this case two questions arise—(1) whether the words "detained in prison" in sub-section (2) of section 123 of the Code of Criminal Procedure are equivalent to imprisonment in jail or to detention in custody, and (2) if the former, *i.e.*, imprisonment, do the provisions of section 397 of the Code apply to the case of a person imprisoned in default of furnishing security who is subsequently convicted and sentenced to imprisonment for an offence?

The words "detained in prison" occur twice in section 123. They must mean the same thing in each instance. In sub-section (1) the words must be taken to be equivalent to "imprisonment," otherwise sub-sections (5) and (6) can have no meaning. Consequently in sub-section (2) the warrant which the Magistrate is bound to issue that a person on failure to give security be detained in prison pending the orders of the higher tribunal to which the records must be submitted must be a warrant of imprisonment, either rigorous or simple as the Magistrate sees fit. See also the definition of "convicted criminal prisoner" in section 3 (3) of Act No. IX of 1894 and section 27 of the same Act as to the difference drawn between a convicted prisoner and an under-trial prisoner. Throughout Chapter VIII of the Code of Criminal Procedure where detention in hawalat is indicated the word used is "custody"—*vide* section 107, for example.

The whole of the proceedings under section 123 (2) are more analogous to what happens when a Court of Session condemns an accused to death and submits the record for confirmation of the sentence to the High Court than to the case of a Magistrate committing an accused person for trial to the Court of Session.

There is no reason why a Magistrate, who must be either a District Magistrate, Presidency Magistrate, or Magistrate of the first class specially empowered by the Local Government, who

after a regular trial comes to the conclusion that if security is not forthcoming the person from whom it has been demanded should be imprisoned, should not be able to send that person at once to jail, if he thinks a period of imprisonment exceeding one year is necessary, seeing that he has full power to order imprisonment up to one year.

The cases of *Queen-Empress* v. *Jafar* (1) and *Emperor* v. *Jawahir* (2) do not touch the question. They only decide that the Magistrate under the second clause of section 123 cannot order imprisonment for three years.

The proviso to sub-section (3) indicates that any period of imprisonment already undergone in obedience to the Magistrate's *ad interim* order shall be taken into account by the Court of Session, so that in no event can the term exceed three years.

If then "detained in prison" in sub-section (2) is equivalent to imprisonment, it seems to follow that a person so detained is undergoing a sentence of imprisonment within the meaning of section 397. It is submitted that the case in the Punjab Record for 1895 (*Diwan Chand*) was wrongly decided.

Section 120 does not help. The opening words of that section have apparently been overlooked by the Punjab Court. Section 120 only applies to persons sentenced to or undergoing imprisonment at the time when an order under section 106 or section 118 is passed and does not refer to the stage reached by section 123.

Besides, this ruling reads into section 397, words which are not there. In section 397 the words "sentence of imprisonment" alone are used, not "sentence for an offence" or "on conviction for an offence." Compare sections 400 and 398. Section 400 clearly would apply to a person undergoing imprisonment in default of security.

If section 397 does not apply, then a person undergoing rigorous imprisonment for default in furnishing security could with impunity commit other offences.

STANLEY, C. J.—This case raises the question whether a person required to execute a bond with sureties for his good behaviour under section 110 of the Code of Criminal Procedure

(1) Weekly Notes, 1899, p. 151. (2) Weekly Notes, 1903, p. 28.

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and the succeeding sections for a period exceeding one year must, pending the orders of the Sessions Judge or High Court, as the case may be, under section 123, be regarded as a prisoner convicted of an offence and imprisoned accordingly, or be merely detained in custody as an under-trial prisoner.

Tula Khan was on the 14th of November 1907 ordered under section 118 of the Code of Criminal Procedure to give security for his good behaviour for a period of three years, and in default of his doing so was ordered to undergo rigorous imprisonment for that period. Later on, namely, on the 27th of November 1907 he was convicted of an offence punishable under section 332 of the Indian Penal Code and sentenced therefor to two years' rigorous imprisonment to take effect forthwith. The order of the Magistrate of the 14th of November 1907 was maintained by the Sessions Judge on the 7th of December 1907.

Two questions then arise.

The first is whether in the interval between the 14th of November 1907, the date of the Magistrate's order, and the 7th of December 1907, the date of the order of the Sessions Judge, Tula Khan was to be regarded as a prisoner undergoing a sentence of imprisonment or merely an under-trial prisoner detained in custody.

The second is whether under the circumstances the sentence of imprisonment passed upon him for the offence punishable under section 332 is to commence at the expiration of the imprisonment ordered by the Magistrate and maintained by the Sessions Judge.

Owing to the looseness of the language used in the sections of the Code dealing with this matter, the question is not free from difficulty. Section 123 (1) provides that if any person ordered to give security under section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case mentioned in sub-section (2) of the section, be *committed to prison*, or if he is already in prison, be *detained in prison* until such period expires, or until within such period he gives the security to the Court or Magistrate who made the order requiring it. Sub-section (2)

provides that when such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or High Court as the case may be. Then sub-section (3) provides that the Court, that is, the Sessions Judge or High Court, as the case may be, after examining the proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, shall pass such orders in the case as it thinks fit.

I have no doubt that the words "committed to prison" in sub-section (1) are equivalent to a sentence of imprisonment and do not merely mean "committed to custody." In the succeeding portion of the section the words "if he is already in prison" give an indication of the meaning of the words "committed to prison." They imply that the party is undergoing imprisonment, and the succeeding words "be detained in prison" seem necessarily to mean that the imprisonment which the party is already undergoing shall be continued. This meaning derives support from sub-section (6), which provides that imprisonment for failure to give security for good behaviour may be rigorous or simple. This sub-section gives us an insight into the mind of the Legislature and indicates the meaning attributed by it to the words "committed to prison" or "detained in prison." In section 3 (3) of Act No. IX of 1894 (the Prisons Act), which gives a definition of convicted criminal prisoners, we find that a person ordered to give security for good behaviour under the bad livelihood sections of the Code is included in the term. This is an Act in *pari materiâ*, and may be looked to in determining the language of the sections with which we are dealing.

Then we come to sub-section (2), in which fall the words which we are called upon to interpret. It provides for the case in which a person has been ordered by the Magistrate to give security for a period exceeding one year, and directs the Magistrate, if such person does not give the security, to "issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge . . . ." Are the words "detained in prison" equivalent to imprisonment, or do they merely mean

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"detained in custody" as an under-trial prisoner? As used in sub-section (1) they must, as I have attempted to show, be regarded as equivalent to imprisonment, and there seems to be no good reason why they should not have a similar meaning in this sub-section. It would be contrary to the principles of interpretation to assign a different meaning to the same words when used in an Act of the Legislature, and particularly so when they occur, as here, in the same section. In view then of the language of the section, I think that the Legislature intended that a person failing to give security for his good behaviour should be liable to imprisonment, either simple or rigorous, and that in a case to which sub-section (2) applies such imprisonment should have effect, pending the orders of the Sessions Judge, from the date on which the warrant of the Magistrate directing detention in prison has been executed.

I now come to the second question, that is, whether Tula Khan was undergoing a sentence of imprisonment within the meaning of section 397 of the Code when the sentence was passed upon him for the offence punishable under section 332. In other words, whether the last mentioned sentence is to be treated as commencing at the expiration of the imprisonment ordered by the Sessions Judge. It seems to me to follow as a corollary to the answer which I would give to the first question that section 397 is applicable. The order of the Sessions Judge cannot be regarded otherwise than as amounting to a sentence of imprisonment, if the words "committed to prison" or "detained in prison" mean imprisonment. I would therefore answer this question in the affirmative.

KNOX, J.—I have had the advantage of reading and considering the judgment of the learned Chief Justice. I need say no more than that I concur.

BANERJI, J.—Two questions arise in this case.

(1) When a person has been ordered by a Magistrate to give security for his good behaviour for a period exceeding one year and that person does not give such security, is the Magistrate competent to issue a warrant for his imprisonment simple or rigorous? and

(2) Is an order of imprisonment for failure to give security for good behaviour a sentence within the meaning of section 397 of the Code of Criminal Procedure ?

As regards the first question it is obvious that the Magistrate has no authority in a case to which sub-section (2) of section 123 of the Code of Criminal Procedure applies to order the person who has failed to give security to be imprisoned for three years or any other specific period. He is only competent under that sub-section to issue a warrant directing such person "to be detained in prison" pending the orders of the Sessions Judge or the High Court as the case may be. The order of the Magistrate in this case directing Tula Khan to be rigorously imprisoned for three years is therefore clearly illegal. The question is whether the Magistrate was competent to order Tula Khan to be kept in simple or rigorous imprisonment pending the orders of the Sessions Judge, or whether he could only direct Tula Khan to be detained in custody as an under-trial prisoner pending such orders. The answer to this question depends on the meaning to be attributed to the words "detained in prison" in that sub-section. Do those words mean imprisonment, or simply detention in custody ? The matter is not free from difficulty, and I must confess that I was at first inclined to hold that the Legislature intended the detention to be detention in custody only, as the Magistrate is not the authority which has to make the final order for imprisonment in the case, and that order must emanate from the Court of the Sessions Judge. No doubt could have arisen in the matter had the Legislature employed the same language in sub-section (2) as it has used in sub-section (1), and had sub-section (2) provided that the Magistrate should issue a warrant directing the person who has failed to give security to be committed to prison, or if he is already in prison to be "detained in prison" pending the orders of the Sessions Judge. However, we have the fact that the same words, namely, "detained in prison" are used in both the sub-sections. There can be no doubt that in sub-section (1) those words mean imprisonment, which may under sub-section (6) be either rigorous or simple. When the Legislature uses the same words in another clause of the same section we must presume that it does so in the same

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sense, and therefore "detention in prison" in sub-section (2) must be held to mean imprisonment, as in the first sub-section. This construction may in some instances result in hardship: for instance, where a person ordered by the Magistrate to furnish security for good behaviour for a period of three years is found by the Sessions Judge to be a person who should not have been ordered to give security, he will have suffered imprisonment before the final order in the case was made. This, however, may happen in many cases of conviction by a subordinate Court. That the Legislature intended the words "detained in prison" to mean imprisonment and not mere detention in custody also appears from the fact that in section 107 it uses the words "detain in custody," and this conclusion finds some support from the definition of a "convicted criminal prisoner" in the Prisons Act (No. IX of 1894). I must therefore hold that when a person ordered by a Magistrate to give security for good behaviour for a period exceeding one year does not give such security the Magistrate is not competent to order such person to be imprisoned for the period for which he has been ordered to give security, but should issue a warrant directing him to be detained in simple or rigorous imprisonment, as the Magistrate may determine, pending the orders of the Sessions Judge or the High Court as the case may be. I may observe that this question was neither raised nor decided in *Queen-Empress* v. *Jafar* (1) and *Emperor* v. *Jawahir* (2), which are the only cases bearing on the point to which our attention was invited.

Upon the second question, namely, whether an order of imprisonment in default of giving security for good behaviour is a sentence within the meaning of section 397, I entertain some doubts. A sentence of imprisonment, ordinarily implies punishment for an offence committed, and therefore imprisonment for failure to furnish security cannot be regarded as a sentence in the ordinary sense of that word. There is much force in the reasoning by which the judgment of the Punjab Chief Court in the case of *Queen-Empress* v. *Diwan Chand* (3) is supported. It seems, however, that the Legislature used the word "sentence"

(1) Weekly Notes, 1899, p. 151. (2) Weekly Notes, 1903, p. 23.
(3) Punjab Rec., 1895, Cr. J., p. 45.

in section 397 in a wide sense. If it were held that the word did not include imprisonment in default of furnishing security, a person undergoing such imprisonment may practically escape punishment for an offence of which he may be subsequently convicted. Section 120 of the Code of Criminal Procedure cannot apply to such a case, and surely it could never have been intended that he should go unpunished. I would therefore answer the second question in the affirmative.

AIKMAN, J.—A Magistrate of the first class ordered one Tula Khan to give security for his good behaviour for a period exceeding one year. The security not having been given, the Magistrate, under the provisions of section 123 (2) of the Code of Criminal Procedure, forwarded the case to the Sessions Judge for orders. In the earlier part of his order the Magistrate directed that in default of furnishing security Tula Khan should undergo rigorous imprisonment for three years. This part of the Magistrate's order was clearly wrong. At the conclusion of his order, however, he directs that pending the order of the Sessions Judge, the accused should undergo imprisonment.

The Magistrate's order was passed on the 14th November 1907.

On the 7th December 1907 the learned Sessions Judge, being satisfied "that the accused is an habitual thief and extortioner and that he is so desperate and dangerous as to render his living at large hazardous to the community," directed that in the event of his failing to furnish the security he be rigorously imprisoned for the term of three years with effect from the date of the Magistrate's order.

In the interval between the date of the Magistrate's order and the date of the Sessions Judge's order Tula Khan was convicted, on the 27th November 1907, by another Magistrate of an offence punishable under section 332 of the Indian Penal Code, and was sentenced to two years' rigorous imprisonment. The Magistrate directed that this sentence should take effect at once and that the accused should subsequently undergo the imprisonment consequent on his failure to furnish security. No appeal, we are informed, has been preferred by the accused against this conviction and sentence.

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The learned Sessions Judge has submitted the case to this Court with the recommendation—1st, that that portion of the order of the Magistrate, dated 14th November 1907, which directs Tula Khan to be rigorously imprisoned for three years in default of furnishing security should be set aside; 2nd that the order of the Magistrate, dated 27th November 1907, in regard to the execution of the sentence under section 332 of the Indian Penal Code, should also be set aside; and 3rd, that his own order of the 7th December 1907 directing the period of imprisonment in default of furnishing security to run from the 14th November 1907 should be modified, and that it should be directed that the period for which Tula Khan is to furnish security and the imprisonment in default should run from the expiration of the sentence under section 332, Indian Penal Code.

With regard to the first recommendation I think it is only necessary to point out the mistake the Magistrate made in his order of 14th November 1907 as the order of the Sessions Judge, dated the 7th December 1907 is now the operative order.

The second and third recommendations of the learned Judge raise a more difficult question. The answer to it depends upon the answer to the question whether Tula Khan when he was sentenced to imprisonment under section 332, Indian Penal Code, was "a person already undergoing a sentence of imprisonment" within the meaning of section 397 of the Code of Criminal Procedure so as to render the provisions of that section applicable.

I think this question must be answered in the affirmative. Section 123 (2) of the Code of Criminal Procedure directs that when a person ordered by a Magistrate to give security for a period exceeding one year fails to give the security required, the Magistrate shall "issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge." I think it cannot be denied that a person detained in prison under such a warrant is, during the period of his detention, undergoing "imprisonment for failure to give security."

The provisions of sub-sections (5) and (6) contain directions as to the nature of the imprisonment in such a case and clearly indicate that a person "detained in prison" under sub-section (2) is in a very different position from a person awaiting his trial

for an offence. The warrant issued in the latter case is a warrant committing him to "custody"—*vide* section 220 of the Code of Criminal Procedure.

The Prisons Act, 1894, draws a distinction between a "convicted criminal prisoner" and an "unconvicted criminal prisoner" and section 3 (3) of that Act declares that the expression "convicted criminal prisoner" includes a person detained in prison under Chapter VIII of the Code of Criminal Procedure, the chapter in which section 123 occurs. I think it is clear from the language both of the Code of Criminal Procedure and of the Prisons Act, 1894, that the Legislature considers that a person who is ordered to be "detained in prison" for failure to give security occupies a very different position from a person who is under trial. I hold that a Magistrate who under section 123 (2) orders a person who has failed to furnish security for his good behaviour to be detained in prison pending the orders of the Sessions Judge thereby sentences the person to imprisonment, which, under sub-section (6), may be rigorous or simple as the Magistrate directs. The proviso to section 123 (3) enacts that the period for which any person is imprisoned for failure to give security shall not exceed three years. In the present case the learned Sessions Judge therefore very properly ordered that the period of three years for which Tula Khan was to be imprisoned in the event of his failing to furnish security was to have effect, not from the date of his own order, but from the date of the Magistrate's order. I hold then that when Tula Khan was sentenced for the offence under section 332, Indian Penal Code, he was a person "already undergoing a sentence of imprisonment" within the meaning of section 397 of the Code of Criminal Procedure. It will be noted that in section 397 the words "for any offence" which we find in section 399 after the word "imprisonment" do not occur. If they did, it would be impossible to hold that section 397 applies to the present case. For the reasons given above I hold that section 397, Code of Criminal Procedure, applies to this case. I cannot therefore accept the learned Judge's second and third recommendations. I would allow the order of the learned Sessions Judge, dated 7th December 1907, to stand, but would modify the order of the Magistrate,

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dated 27th November 1907, by setting aside so much of it as directed that the sentence under section 332, Indian Penal Code, should take effect forthwith, and in lieu thereof direct that that sentence shall commence at the expiration of the imprisonment adjudged to him (Cf. Form XIV, Sch. V, Code of Criminal Procedure) owing to his failure to furnish security for his good behaviour.

RICHARDS, J.—The first question which arises is the meaning of the expression "detained in prison" in section 123, sub-section (2) of the Code of Criminal Procedure. In other words, should a Magistrate after he has ordered a person to give security under section 106 or section 118, and after that person has failed to give security, issue a warrant directing the person to be kept in rigorous or simple imprisonment pending the orders of the Sessions Judge, or should the warrant simply direct that that person should be kept in custody? The argument in favour of the latter construction is that the position of the person named in the warrant is analogous to the position of an "under-trial" prisoner; that the Magistrate has no power to order the person to be imprisoned because the final order must be made by the Sessions Judge, who may possibly discharge the accused altogether.

Clause (1) provides that on failure to give security in the case of a person ordered to give such security for a period not exceeding one year the Magistrate shall commit the person to prison, or if the person is already in prison shall detain him in prison.

Clause (5) provides that imprisonment for failure to give security for keeping the peace shall be simple.

Clause (6) provides that imprisonment for failure to give security for good behaviour may be rigorous or simple.

Section 3 (3) of Act IX of 1894 includes in the definition of "convicted criminal prisoner" any person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure.

Reading clauses (1), (5) and (6) of section 123 together, it is perfectly clear that a person who has been ordered to give security by a Magistrate for a period not exceeding one year,

and who has failed to give such security, must be imprisoned with either simple or rigorous imprisonment.

Had clause (2), after the words "warrant directing him," read "to be committed to prison or to be detained in prison," that is to say, had the same mode of expression been adopted in clause (2) as in clause (1) there would be no difficulty. The change of expression, no doubt, creates some ambiguity. I, however, think that if the expression "detained in prison" in clause (1) means detained in simple or rigorous imprisonment, the same expression in clause (2) must have the same meaning. This view is strengthened by the definition of "convicted criminal prisoner" to which I have already referred, and also by a comparison with clauses (3) and (4) of section 107, where the expression "detaining such person in custody" and "detain such person in custody" are used. I do not think that the argument based on the supposed analogy of a person ordered to give security for a period exceeding one year with an under-trial prisoner is sound. A particular class of Magistrate is prescribed by the Code for holding the inquiry which must be held before an order under section 123 is passed: it is such a Magistrate who must always adjudicate whether or not the person is a person from whom security ought to be demanded. If security is only to be demanded for one year the Magistrate makes a complete order. It is only when the Magistrate has ordered the person to give security for a period exceeding one year, and the person has failed to give such security, that the proceedings are to be laid before the Sessions Judge. If the Legislature has given power to the Magistrate to send a person to rigorous or simple imprisonment whom he has found to be a person from whom security should be demanded for one year, I can see no reason why he should not have power to send a person to like imprisonment whom he has found to be a worse and more dangerous character. The imprisonment should of course be only as provided by section, that is, pending the orders of the Sessions Judge.

On the second question I agree with the judgment of the learned Chief Justice.

BY THE COURT.—The order of the Court is that the order of M. Abdul Jalil, dated 14th November 1907, in so far as it directs

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Tula Khan to be rigorously imprisoned for three years be set aside; that the said order be altered into one directing the detention of Tula Khan in rigorous imprisonment pending the orders of the Sessions Judge; that the order of the Sessions Judge dated 7th December 1907 be affirmed, and that the order of M. Mata Badal dated 27th November 1907 be modified to this extent that the sentence passed by him on Tula Khan under section 332 of the Indian Penal Code do take effect from the date of the expiration of Tula Khan's imprisonment for failure to give security for his good behaviour.

1908 *April* 27.

APPELLATE CIVIL.

Before Mr. Justice Aikman and Mr. Justice Griffin.

HANWANT SINGH AND OTHERS (APPLICANTS) *v.* RAM GOPAL SINGH AND OTHERS (OPPOSITE PARTIES) *

Civil Procedure Code, sections 367, 588 (18)—*Dispute as to who is the legal representative of a deceased appellant—Appeal.*

Held on a construction of section 367 of the Code of Civil Procedure that a dispute as to who is the legal representative of a deceased appellant is not confined to the case of rival claimants to represent the deceased. *Subbayya* v. *Saminadayyar* (1) followed.

THE facts of this case are as follows:—

One Dunia Singh brought a suit against Ram Gopal Singh and others for redemption of a mortgage. The suit was dismissed by the Court of first instance. Dunia Singh filed an appeal against the decree of the first Court, but died after filing the appeal. Within the time allowed by law, Hanwant Singh and others, who were admittedly the sons of Dunia Singh's first cousin, applied to be brought on the record as appellants in place of the deceased Dunia Singh. The mortgagees defendants disputed their right to be brought on the record, on the ground that, being of illegitimate birth, they were not the legal representatives of the deceased. A considerable number of witnesses were examined, and in the result the District Judge held that the applicants had been unable to successfully rebut the evidence adduced by the other side. He consequently

* First Appeal No. 62 of 1907 from an order of G. A. Paterson, District Judge of Benares, dated the 6th of April 1907.

(1) (1895) I. L. R., 18 Mad., 496.

dismissed their application. Against this order the applicants appealed to the High Court. At the hearing a preliminary objection was raised that no appeal lay.

Munshi *Haribans Sahai*, for the appellants.

Pandit *Baldeo Ram Dave* and Munshi *Kalindi Prasad*, for the respondents.

AIKMAN and GRIFFIN, JJ.—One Dunia Singh brought a suit against the respondents for redemption of a mortgage. The suit was dismissed by the Court of first instance. Dunia Singh filed an appeal against the decree of the first Court, but died after filing the appeal. Within the time allowed by law, the appellants, who are admitted to be the sons of Dunia Singh's first cousin, applied to be brought on the record as appellants in place of the deceased Dunia Singh. The mortgagees, defendants respondents, disputed their right to be brought on the record, on the ground that, being of illegitimate birth, they were not the legal representatives of the deceased. A considerable number of witnesses were examined, and in the result the learned District Judge held that the appellants had been unable to successfully rebut the evidence adduced by the other side. He consequently dismissed their application. The present appeal has been preferred against the order of the learned Judge. For the respondents a preliminary objection is raised that no appeal lies. If the order of the Court below can be regarded as an order under section $\frac{367}{582}$ of the Court of Civil Procedure, there can be no doubt that a right of appeal is given by section 588, clause (18). Section 365 of the Code provides that the legal representative of a deceased plaintiff may, where the right to sue survives, apply to have his name entered on the record in place of the deceased plaintiff, and the Court shall thereupon enter his name and proceed with the suit. We think that this clearly applies to a case where it is not disputed that the applicant is the legal representative of the deceased. Here the applicants' claim to be regarded as the deceased's representatives was disputed. In our opinion section 367 applies to this case. It is contended by the learned vakil for the respondents that section 367 only applies when there are rival claimants to represent the deceased. We see no reason for placing any such restriction on the

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HANWANT SINGH v. RAM GOPAL SINGH.

meaning of the section. In the case of *Subbayya* v. *Saminadayyar* (1) the learned Judges say:—"We agree with the Judge that a dispute within the meaning of that section (*i.e.*, section 367) need not be between persons claiming to represent the deceased plaintiff."

Coming then to the merits of the case, we have read all the evidence adduced by the parties. We regret we cannot agree in the conclusion arrived at by the learned Judge. It being admitted that the appellants are the sons of the deceased's first cousin, the onus was on the other side to prove the case of illegitimacy which they set up. They called three witnesses, not one of them a resident of the village in which the applicants live, and in which the deceased lived, and none of them related to the family. In our opinion the evidence of these witnesses is of a vague and inconclusive nature. For the applicants evidence was given by witnesses, some of whom were related to the applicants' family and others residents of their village. Even had the onus not been on the respondents, we should have considered the evidence of the appellants' witnesses in every way preferable to the evidence of the witnesses adduced by the respondents. We allow the appeal, and we set aside the order of the Court below rejecting the appellants' application, and we direct that the appellants be admitted to be the legal representatives of Dunia Singh for the purpose of prosecuting the appeal in the Court below. The appellants will have the costs of this appeal.

Appeal decreed.

(1) (1895) I. L. R., 18 Mad., 496.

APPELLATE CRIMINAL.

1908
April 29.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

EMPEROR *v.* MATA PRASAD.*

Criminal Procedure Code, sections 234, 235—*Charge—Misjoinder of charges—Illegality.*

An accused person was charged with and tried for, first, three separate acts of criminal misappropriation committed within a year, and, secondly, two separate offences of forgery with intent to conceal two of such acts of criminal misappropriation. *Held* that this was an illegality not covered by the provisions of section 537 of the Code of Criminal Procedure.

THIS was a point referred by Griffin, J., to a Division Bench. The circumstances out of which the question arose appear from the referring order.

Mr. *M. L. Agarwala*, for the appellant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

GRIFFIN, J.—The appellant in this case has been convicted in one and the same trial on three charges of criminal misappropriation and on two charges of forgery to cover up two items said to have been embezzled. He has been sentenced in the aggregate to 6 years on the charges under section 409, Indian Penal Code, and to 8 years under section 467, Indian Penal Code.

It is contended on his behalf that the trial of the accused was bad, inasmuch as there has been an illegal joinder of charges. I am referred to the rulings in *Subrahmania Ayyar* v. *King-Emperor* (1), *Kasi Viswanathan* v. *King-Emperor* (2) and *Manavala Chetty* v *Emperor* (3).

The point is one that does not appear to have come before his Court. At least I have not been referred to any ruling bearing upon it. It is one of some importance, and I think should be decided by a Bench of two Judges. I accordingly refer the p nt to a Division Bench.

On this reference the following order was passed.

KNOX and AIKMAN, JJ.—We think that the first plea taken in the petition of appeal must be sustained. The appellant was

* Criminal Appeal No. 46 of 1908 against an order of W. R. G. Moir, Additional Sessions Judge of Gorakhpur, dated the 20th November 1907.

(1) (1901) I. L. R., 25 Mad., 61. (2) (1907) I. L. R., 30 Mad., 328. (3) (1906) I. L. R., 29 Mad., 569.

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charged with three separate acts of criminal misappropriation committed within one year. He was also charged with having committed two separate offences of forgery. All these five offences were tried together at one and the same trial. The joint trial of these five offences cannot be supported by any provision contained in the Code of Criminal Procedure. The series of acts charged do not form the same transaction.

We therefore set aside the conviction and order new trials on charges framed in accordance with law. The three acts of criminal misappropriation may form the subject of one trial. Evidence of forgeries may be given in support of the charges of misappropriation. If it is desired to try the accused for the forgeries that must form the subject of a separate trial.

1908
May 1.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

HIMMAT BAHADUR AND ANOTHER (PLAINTIFFS) *v.* BHAWANI KUNWAR AND ANOTHER (DEFENDANTS).*

Hindu law—Hindu widow—Payment by wife of husband's debts during his lifetime—Voluntary payment—Joint Hindu family—Sale of property belonging to one member of a joint family—Separation—Sale set aside—Rights of persons entitled to such property after separation.

Held that the payment by the wife of a separated Hindu of her husband's debts during his lifetime must be considered in the absence of evidence to the contrary as a voluntary payment, and will not support an alienation by the widow after her husband's death of the estate which has descended to her from him.

Held also that the members of a joint Hindu family must be regarded, so far as concerns the dealings of the family with persons outside it, as but one juristic person.

The managing member of a joint Hindu family sold a property exclusively belonging to one member of the joint family, and the proceeds of the sale were brought into the common purse for the benefit of the family. *Held* that on the sale of that property being set aside after the separation of that member, he could recover the whole property on payment of the whole purchase money, but that he could not claim to have it by paying only a share of the purchase money proportionate to his share in the joint family property

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* First Appeal No. 243 of 1905 from a decree of Madho Das, Subordinate Judge of Shahjahanpur, dated the 11th of August 1905.

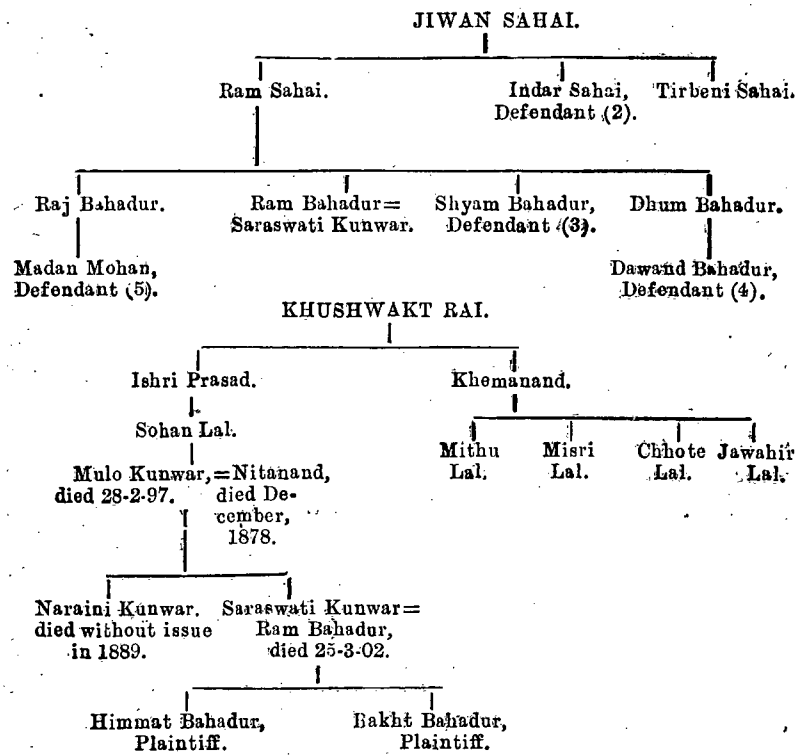
on partition. *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1), *Appovier* v. *Rama Subba Aiyan* (2) and *Hasmat Rai* v. *Sunder Das*, (3) referred to.

THE facts of this case are fully stated in the judgment of Karamat Husein, J.

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru*, the Hon'ble Pandit *Sundar Lal*, Mr. *G. W. Dillon* and Dr. *Satish Chandra Banerji*, for the appellants.

Sir *Walter Colvin*, and Messrs. *Abdul Majid* and *B. E. O'Conor*, for the respondents.

KARAMAT HUSAIN, J.—Before stating the facts of the case I set forth the following pedigree. It will show the relation of the parties to the suit, with the exception of Musammat Bhawani Kunwar who is a transferee of Jiwan Sahai under the sale-deed of the 9th February 1892. The suit was instituted on the 14th December 1904.



(1) (1901) I. L. R., 25 Mad., 149. (2) (1866) 11 Moo., I. A., 75.
(3) (1885) I. L. R., 11 Calc., 396.

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HIMMAT BAHADUR v. BHAWANI KUNWAR.

The facts which have led up to this appeal are as follows:—

One Malik Muhammad Ali Khan obtained two decrees against Ishri Prasad and his brother Khemanand. One was dated the 17th August, 1822, for Rs. 23,348-3-0 and the other was dated the 20th August, 1822, for Rs. 17,800. These decrees were put in execution from time to time, and a sum larger than that which was actually due was realized under them. A suit then was instituted for the ascertainment of the excess, and the High Court in 1869 fixed it at Rs. 41,600. Soon after the amount of the excess had been fixed, the heirs of Ishri Prasad and Khemanand started proceedings to recover it from the property of Husaini Begam, a daughter of Malik Muhammad Ali Khan. The village Parewa belonging to her was attached and sold on the 20th September 1877. One Nur Ahmad purchased it for Rs. 52,000. Babu Ram Sarup, who had purchased the rights and interests of two of the four sons of Khemanand, realized on the 27th and 28th November, 1877, Rs. 49,107 out of the sale-proceeds of Parewa, and deposited the same with Jadon Rai and Baldeo Prasad. Out of the sum so deposited Musammat Mulo Kunwar withdrew sums amounting to Rs. 21,475 by instalments. Out of the money so received she applied Rs. 17,612 to the payment of the debts due by her husband Nitanand in his life-time.

The sale of Parewa in a suit brought by one Altaf Ali Khan was set aside on the 30th of January 1878, and on the sale being set aside Nur Ahmad on the 12th December 1878 applied for the return of his purchase money and his application was granted on the 20th December 1878. He proceeded against the property which Musammat Mulo had inherited from her father and her husband. She sued Nur Ahmad for a declaration that she was not liable to refund the entire sum realized by Ram Sarup. The High Court on the 25th November 1878 held that she as an heir of Ishri Prasad was liable to pay the entire amount. Nur Ahmad realised portions of his claim and a balance of Rs. 21,815-6-6 remained due to him. This is the balance for which, according to the allegations in paragraph 15 of the plaint, the heirs of Khemanand alone were liable. Jiwan Sahai paid this balance, at the instance of Musammat Mulo Kunwar, to Aziz Ahmad and Zamir Ahmad, sons of Nur Ahmad, for the discharge of the money due

to their father. The money was paid out of the proceeds of the sale of the property which was sold by Jiwan Sahai to the sons of Nur Ahmad on the 4th of May 1885.

In order to pay the debt due to Jiwan Sahai Musammat Mulo Kunwar sold to him on the 30th September 1890 for Rs. 17.665 the property in suit which she had inherited from her husband. As Musammat Saraswati, mother of the plaintiffs, was recorded in the revenue papers as owner of the property in dispute, she also joined her mother in selling the property to Jiwan Sahai. On the 9th February 1892 Jiwan Sahai and Banke Bihari Lal, a co-sharer in the village, sold the entire 20 biswas of the village Yusufpur and 13 biswas 6 biswansis 6 kachwansis and 15 nanwansis in the villlage of Deora Shaikhpur to Bhawani Kunwar for Rs. 30,000. The property sold included the property in dispute and the share of Jiwan Sahai in the sale proceeds was Rs. 17,400. Besides selling the property in dispute to Bhawani Kunwar, Jiwan Sahai executed an agreement on the 9th February 1892. in which he covenanted that in the event of the plaintiffs recovering the property from her she would be entitled to recover the price paid by her from certain immovable property of his which was specified in the agreement.

As Bhawani Kunwar could not pay the whole price of the property so purchased by her she hypothecated it in favour of Jiwan Sahai by way of security under a deed of the 11th February 1892. She from time to time paid portions of the mortgage debt with interest. After the death of Jiwan Sahai she deposited the balance of the mortgage debt, *i. e.*, a sum of Rs. 5,456-10-3, in Court for payment to the representatives of Jiwan Sahai.

Indar Sahai and others applied on the 27th July 1899 for payment to them of the money so deposited, but their application was refused. On the 19th March 1902 another application for payment was made by them, but it was also unsuccessful. The case of the plaintiffs with reference to the facts stated above is that they are the heirs of their maternal grandfather Nitanand; that the sale of the property left by Nitanand was made by Mulo Kunwar without legal necessity and was therefore void as against them, and that they are entitled to a decree for proprietary possession hereof. They also allege that for the payment of Rs. 21,815-6-6

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the heirs of Khemanand alone were liable. Bhawani Kunwar in her defence pleaded that the heir of Jiwan Sahai were necessary parties to the suit; that the suit was barred by limitation; that the plaintiffs were estopped from questioning the sale carried out by Jiwan Sahai; that the debts due by Nitanand were paid out of the sale proceeds of Parewa, and that it was the duty of Mulo Kunwar and Saraswati to sell the property of Nitanand to discharge his debts; that the sale of the 30th September 1890 is binding upon the plaintiffs; that the plaintiffs and Jiwan Sahai were members of a joint Hindu family and as such were benefited to the extent of the funds realised by the sale effected by Jiwan Sahai, and that the plaintiffs are bound by that sale.

The learned Subordinate Judge framed the following issues:—

1. Is the plaintiffs' suit barred by limitation?

2. Is the suit barred by section 115 of the Indian Evidence Act?

3. Was the estate of Khemanand alone liable for the sum of Rs. 21,815-6-6 paid by Musammat Mulo Kunwar through Jiwan Sahai for the discharge of Nur Ahmad's decree, or was Ishri Prasad's estate also liable for it?

4. Were any debts of Nitanand, and if any, of what amount, repaid out of the money forming the consideration for the sale-deed of 30th September 1890 executed by Mulo Kunwar in favour of Jiwan Sahai, and what effect has this fact on the alienation of Nitanand's property which is the subject matter of the suit? What are the plaintiffs' liabilities under the deed?

5. Are the plaintiffs bound by the transfer made by Jiwan Sahai to Bhawani Kunwar because he was their (great) grandfather?

6. Were Jiwan Sahai and the plaintiffs members of an undivided Hindu family, and what effect has this fact in the suit?

7. Is Indar Sahai a necessary party to the suit? Did Jiwan Sahai transfer the property to Bhawani Kunwar in good faith?

Regarding the 7th issue the learned Subordinate Judge says:— "Indar Sahai has subsequently been made a party to the suit. He denies his connection with the suit and the correctness of the plaintiffs' claim." His finding on the first issue was that the suit was not barred by limitation, inasmuch as the alienation sought to be

set aside had been made during the minority of the plaintiffs and as the suit was instituted within three years of their attaining majority. On the second issue he found that the plaintiffs were not estopped, as they were not parties to the applications of the 27th July 1899 and the 19th March 1902 relied on by the defendants. On the 3rd issue he found that under the decree of the High Court dated the 25th November 1884 the estate of Ishri Prasad was liable for Rs. 21,815-6-6. On the 4th issue he came to the conclusion that, although the debts due by Nitanand were paid off by Mulo Kunwar from her share in the sale proceeds of Parewa yet the plaintiffs were bound by the sale. The learned Subordinate Judge, on the findings already stated, dismissed the plaintiffs' claim without trying issues 5 and 6. The plaintiffs then preferred this appeal to this Court. The grounds urged in appeal are to the effect that the voluntary payments made by Mulo Kunwar in the life-time of her husband towards the discharge of debts due by him did not entitle her after his death to transfer his property and that the plaintiffs are not bound by the sale effected by her. It was also urged on the plaintiffs' behalf that they were entitled in any event to a decree for the recovery of the property in suit on payment of such sum of money as the Court should consider them liable to pay.

The appeal came on for hearing on the 11th December 1907, and the following three issues were referred by this Court under section 566 of the Code of Civil Procedure for trial to the Court below:—

"1. At the date of the sale to Musammat Bhawani Kunwar and the receipt of the purchase money were the plaintiffs and Jiwan Sahai members of a joint Hindu family?"

"2. If the family was not joint at that time, or had ceased to be joint since that time, to what share of the joint estate did the plaintiffs become entitled on separation?"

"3. Did the plaintiffs receive any, and, if so, what benefit from the purchase made by Musammat Bhawani Kunwar from Jiwan Sahai?"

On the first issue the learned Subordinate Judge found that the plaintiffs and Jiwan Sahai were joint on the date of the sale to Bhawani Kunwar and the receipt of the purchase money.

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No objection has been taken to this finding. His finding on the second issue was that, according to the plaintiffs, separation took place in 1894 among all the members of the family, while according to the defendant Indar Sahai alone separated in 1897, and that plaintiffs became entitled to a one-eighth share in the joint estate on separation. On the third issue the learned Subordinate Judge found that the plaintiffs were to be presumed to be benefited to the extent of one-eighth of the sale consideration of Rs. 17,400, *i.e.* Rs. 2,175. Objections were taken to the above findings to the effect that as the price was received while the family was joint it was not correct to say that the plaintiffs were benefited to the extent of one-eighth of the price only.

At the hearing of the appeal on the return of the findings two points were urged on behalf of the appellants. First, it was urged that as the payments which were made by Mulo Kunwar were made in the life-time of her husband they could not come within the meaning of the term "debt" for the discharge of which his widow could lawfully sell the property she had inherited from him. Secondly, it was contended that as the plaintiffs on separation were benefited to the extent of one-eighth of the price, they were entitled to recover the property in dispute on the payment of Rs. 2,175. The first contention, in my opinion, is well founded. The obligation to pay the debt of a person whose estate is taken by another person rests as Mr. Mayne puts it, "upon the broad equity that he who takes the benefit should take the burden also." (Mayne on Hindu Law, § 327, p. 423, 7th edition.) The existence of debts due by the ancestor at the time of his death is therefore a condition precedent to the liability of the heir to pay them. If there are no debts due by the deceased his heir has no burden to take. In the case before us certain debts incurred by Nitanand were no doubt paid off by his wife, but they were paid in his life-time. In the absence of any evidence to prove the contrary, those payments must be presumed to have been voluntary payments and the presumption gains much strength from the relationship of husband and wife in which the parties stood to each other. Such being the case, the property which Mulo Kunwar inherited from her husband Nitanand could not be made liable

for the debts which had no existence at his death and the transfer of such property by her could not be deemed to be a transfer made for the payment of his debts. The plaintiffs therefore could not be bound by the sale deed executed by Mulo Kunwar on the 30th September 1890.

For the decision of the second point, *i.e.*, the right of the plaintiffs to recover the property in dispute on payment of Rs. 2,175, it is to be borne in mind that Bhawani Kunwar is in possession of that property; that Jiwan, who presumably was the manager of the joint Hindu family, sold it for the benefit of the family with an undertaking to make good any loss which Bhawani Kunwar might sustain if she were dispossessed of it in a suit by the plaintiffs; that the plaintiffs were joint with Jiwan Sahai at the time of the sale and receipt of the purchase money, and that this purchase money was brought into the common purse of the joint Hindu family for the benefit of the family.

In addition to the above facts two traits of a joint Hindu family governed by the Mitakshara are also to be borne in mind. They are the *unity of juristic existence* in dealings with third persons and the *unity of ownership* of the joint property by the members of the joint family. That these traits are to be found in such a joint family will appear from the following remarks:—"The term 'joint' in the expression 'joint Hindu family' has been borrowed from the language of English Property Law." (K. K. Bhattacharyya, Joint Hindu Family, page 51, edn. of 1885.) It is not only the term 'joint' which has been borrowed from the English law: several incidents of joint tenancy have also been imported into the law governing a joint Hindu family. "As soon as it was observed that there was a very tangible analogy between Hindu coparceners and English joint tenants, it was inevitable that incidents of English joint tenancy should have been extended to the legal position of the Hindu coparceners, at least in cases where such extension did not run counter to anything to be found in the original texts. We must remember that the Judges who did this had no other course left open to them; for they were familar with the law of English joint tenancy; they saw nothing in the original texts,

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or in the translations, to guide them in the particular instances; certainly the most reasonable course for them was, avowedly or not, to take advantage of that other law they were familiar with, supported as this course was with the analogy already adverted to." (K. K. Bhattacharyya, Joint Hindu Family, p. 54, 55, edn. of 1885.) Out of the incidents of the joint tenancy which have been introduced into the law of the joint Hindu family I am here concerned with two. The first is that all the joint tenants as regards strangers are deemed for juristic purposes as *one single individual.* "A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves the properties of one single owner" (Williams on Real Property, page 133, 18th edn.). "Joint tenancy, as its name bespeaks, is essentially a joint interest: whatever may be their rights as between themselves, as regards strangers all the holders of an estate in joint tenancy are regarded but as a single individual. It results from this principle, that, so long as there remains any participant of the joint ownership, so long does the estate continue, and therefore, in case of the death of one or more it will survive to the remainder." (Goodeve, Real Property, p. 239, 2nd edn.). "The joint tenants are as regards third persons considered to be one single owner" (Shephard and Browne on the Transfer of Property Act, p. 145, 6th edn.) This *unity of juristic existence* finds its place in the law of the joint Hindu family, as appears from the following passages:— "This old law laid down by the original texts prohibiting the members from reciprocally bearing testimony, or becoming sureties or giving or accepting presents seems to be founded upon the principle that all the members together constitute a single entity in the eye of law." (K. K. Bhattacharyya, Joint Hindu Family, p. 203, edn. of 1885.) Sir W. Bhashyam Ayyangar in *Sudarasanam* v. *Narasimhulu* (1) remarks:—"But so long as a family remains an undivided unit, two or more members of different branches or of one and the same branch of the family can have no legal existence as a separate independent unit, but if they comprise all the members of a branch they can form a distinct and separate corporate unit within the larger

(1) (1901) I. L. R., 25 Mad., 149, at p. 155.

corporate unit and hold property as such." The second trait, *i.e.*, the *unity of the ownership* of the joint property by the members of a joint Hindu family under the Mitakshara has been explained by their Lordships of the Privy Council in *Appovier* v. *Rama Subba Aiyan* (1) as follows:—"According to the true notion of an undivided family in Hindu law no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rents, and claim to take from the collector or bailiff of the rents a certain definite share. The proceeds of the undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the mode of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of an undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with, and in the estate each member has henceforth a definite and certain share which he may claim a right to receive and enjoy in severalty, although the property itself has not been actually severed and divided."

Now I have to consider certain consequences of the two unities already mentioned. A corollary of the unity of ownership is that the plaintiffs cannot be deemed to have been benefited to the extent of one-eighth of the sale consideration. The fact that at a subsequent separation they got one-eighth of the joint property cannot be a measure of the benefit received by them at a former time when they were joint. The above corollary settles the question of the *quantum* of the liability of the plaintiffs, for if their benefit in the sale consideration is not a determinate share, their liability cannot be for a proportionate share of it. This leads me to consider whether they are or are not liable to refund the sale consideration at all. Having regard to a corollary of the unity of the juristic existence in dealings with third persons all

(1) (1866) 11 Moo., I. A., 75.

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the members who formed this joint Hindu family at the receipt of the price of the property sold to Bhawani Kunwar are jointly liable for the whole of it. If the sale in her favour is set aside, she is entitled to a refund of the whole price paid by her, and she can recover it from one of the members who constituted the joint Hindu family at the time of its receipt as well as from the entire group. The plaintiffs as heirs of Nitanand are entitled to have the sale of his property to Jiwan Sahai set aside, but as members of a joint Hindu family for the common benefit of which the whole consideration of the sale by Jiwan Sahai was brought into the common purse of the family are liable to refund the whole of it to Bhawani Kunwar. They cannot say that on a subsequent partition they got one-eighth of the family property only and therefore have a right to recover the property on payment of the one-eighth of the purchase money. That share was their right on partition with reference to the other members of the joint family, but the liability as regards Bhawani Kunwar is a single liability to return the whole of the purchase money paid by her. The case of *Hasmat Rai* v. *Sunder Das*, (1) though not on all fours with the present case, favours the view taken by me. According to that case, if the sale to Bhawani Kunwar were set aside, the whole of the purchase money would be a debt of Jiwan Sahai, and unless his son showed that it had been contracted for immoral purposes mentioned in the Hindu Shastras, the whole of the joint family property would be liable for it, and the sons could not recover the whole or any portion of the property sold without refunding the whole of the purchase money. For the above reasons I hold that the plaintiffs are entitled to recover the property in dispute from Bhawani Kunwar on the payment of Rs. 17,400. I would therefore allow the appeal, set aside the decree of the Court below and give the plaintiffs a decree for possession of the property in suit provided that they deposit into Court for payment to Musammat Bhawani Kunwar defendant No. 1 a sum of Rs. 17,400 (seventeen thousand four hundred) on or before the 1st November, 1908. If they fail to deposit the said sum of Rs. 17,400 their suit shall stand dismissed with costs in both Courts. The plaintiffs will be entitled to mesne profits from the date of deposit

(1) (1885) I. L. R., 11 Calc., 396.

into Court to the date of delivery of actual possession to them of the property in suit.

STANLEY, C. J.—I agree with my learned colleague in the conclusion at which he has arrived. The questions involved in the appeal present some difficulty, particularly the question whether the plaintiffs appellants could be put under terms to pay the amount of the purchase money paid by Musammat Bhawani Kunwar to Jiwan Sahai, or any part of that sum, as a condition precedent to the recovery of the property claimed. It appears to me, however, in agreement with my learned brother, that we cannot say that the benefit of the payment made to Jiwan Sahai, who was the head of the joint family of which the plaintiffs were members at the time can be now sub-divided so as to enable us to say that the plaintiffs only partially enjoyed the benefit. Under all the circumstances, I think that if the plaintiffs are to recover the property they are in equity bound to pay the amount of the moneys received by the head of the family when it was joint, that is, the sum of Rs. 17,400. It may be that the plaintiffs, if they pay this amount, will be entitled to recover contribution from the other members of the family. This question, however, is not before us. I concur in the order proposed.

BY THE COURT:—The appeal is allowed, the decree of the Court below is set aside, and a decree for possession of the property in dispute given to the plaintiffs, provided that they deposit in Court for payment to Musammat Bhawani Kunwar the defendant No. 1 a sum of Rs. 17,400 on or before the 1st of November 1908. On payment by the plaintiffs of the aforesaid sum, they will be entitled to the costs of this appeal and also the costs in the Court below, also to mesne profits from the date of the deposit up to the date of delivery of actual possession. If they fail to make the deposit their suit shall stand dismissed with costs in both Courts.

Appeal decreed.

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May 4.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox

EMPEROR v. RAM BILAS.*

Criminal Procedure Code, sections 133 *et seqq.—Procedure—Obstruction to public way—Jury.*

Where, at the request of a person upon whom a notice has been served under section 133 of the Code of Criminal Procedure a jury is appointed under section 138 of the Code, it is within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed is not a public way. It is not for the Magistrate to decide whether such an objection is raised *bonâ fide* before referring it to the jury. *Kailash Chunder Sen* v. *Ram Lall Mittra* (1) not followed.

Held also that there is no special procedure laid down by the Code to be adopted by a jury appointed under section 138 in coming to a finding on the questions submitted to them. *Queen-Empress* v. *Khushali Ram*, (2) referred to.

Held also that a person who has applied for a jury under section 138 is bound by the verdict of the jury, and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of a *bonâ fide* claim of right. *In the matter of the petition of Lachman* (3) followed.

This was an application for revision made by one Ram Bilas, the owner of a firm which had a shop situated in the bazar of Barauli in the district of Gorakhpur. It appeared that Ram Bilas usually resided in Jaipur and that the shop at Barauli was conducted by managers on his behalf. The sub-divisional officer of Deoria, being of opinion that a chabutra and a tin shed attached to the shop of Ram Bilas at Barauli was an unlawful obstruction which should be removed from a road used by the public, issued a notice to Ram Bilas calling upon him to show cause why this chabutra should not be removed. The notice was dated 17th of August 1907, and appears to have been accepted by one Makund Ram, mukhtar-am of the firm of Ram Karan Ram Bilas, by which name the Barauli shop was known. On the 16th of December 1907, an application was put in, signed by a vakil on behalf of the firm of Ram Karan Ram Bilas, asking for a jury to decide upon the propriety of the sub-divisional officer's order and nominating two persons to act as jurors on behalf of the firm

* Criminal Rivision No. 59 of 1908 from an order of Ram Ratan Lal, Sub-Divisional Officer of Deoria, District Gorakhpur, dated the 11th of January 1908.

(1) (1899) I. L. R., 26 Calc., 869. (2) (1895) I. L. R., 18 All., 158.
(3) Weekly Notes, 1900, p. 180.

of Ram Karan Ram Bilas. The Magistrate accepted the applicant's nominees, and named two other persons to serve on the jury. On the 3rd of January 1908 the jury submitted their verdict, which was duly placed on the record, and an order was passed that the pacca chabutra and tin shed should be removed. Against this order Ram Bilas applied in revision to the High Court.

Mr. *C. Ross Alston*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

KNOX, J.—The applicant in this case is one Ram Bilas. The said Ram Bilas is the owner of a firm which has a shop situate in Barauli Bazar in the district of Gorakhpur.

According to an affidavit, dated the 9th of March 1908, and filed in these proceedings, Ram Bilas resides in the Jaipur State, and his firm at Barauli, known as the firm of Ram Karan Ram Bilas, is in the hands of managers.

The Sub-Divisional Magistrate being of opinion that a chabutra attached to the premises of Ram Karan Ram Bilas was an unlawful obstruction which should be removed from a road used by the public, issued a notice upon Ram Bilas calling upon him to appear and show cause why the obstruction should not be removed. This notice is dated the 17th of August 1907, and bears an endorsement which is said to be an endorsement by Makund Ram, mukhtar-am of the firm of Ram Karan Ram Bilas. On the 16th of December 1907, an application was put in and signed by a vakil on behalf of Ram Karan Ram Bilas to the effect that he nominated certain persons to act on his behalf as a jury to decide the question raised by the Sub-Divisional Magistrate. The Magistrate accepted the persons named by or on behalf of Ram Karan Ram Bilas and nominated two other persons to serve on the jury. On the 3rd of January 1908, the jury submitted a verdict, which was duly placed upon the record, and an order passed that the pacca chabutra and tin shed should be removed. No objection at the time was raised to this verdict, as the order of the Magistrate on the same will show. But in revision here it is urged that section 133 of the Code of Criminal Procedure cannot apply to these proceedings. It is further

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contended that the proceedings have not been regularly held and that the conclusion was not based on the evidence, but on a local inspection.

Among other grounds urged before me was that the notice under section 133 had never been legally served upon Ram Bilas. Neither of the affidavits go so far as to say that he (Ram Bilas) has not been cognizant of the proceedings. Stress is laid on the technical point that the summons was served, not upon him but upon his agent. I find it impossible to believe that in a matter like this Ram Bilas could or would have been kept in ignorance of what was going on, and this adds more significance to the fact that the affidavit nowhere expresses his personal ignorance of what was taking place. Again, the learned counsel who appeared for Ram Bilas took his stand upon several rulings of the Calcutta High Court, notably that of *Kailash Chunder Sen* v. *Ram Lall Mittra* (1). The Calcutta High Court appear to hold that when a person called upon under section 133 to show cause why an obstruction should not be removed from a public way, denies that the latter is a public way, it is for the Magistrate to determine whether this is a *bonâ fide* objection, and he cannot, in spite of the objection, unless he determines that it is not *bonâ fide*, refer the matter to the jury. The jury is not competent to decide whether the way obstructed is or is not a public way. How far this goes or does not go beyond the Code I need not decide. The question which was at issue was that the chabutra and shed complained of were unlawful obstructions which should be removed from a way which was lawfully used by the public. The contention raised on behalf of Ram Bilas is that the chabutra and shed are not situate in that portion which is admittedly portion of a way lawfully used by the public, but fall within a certain portion of that ground which had been by some Magistrate remitted for use by the persons who have erected shops in this public place. I think the question raised was one which could, under the terms of the Code, be left to a jury to decide.

Again, it was contended on the strength of the Calcutta case that a jury was bound to hear the parties and such witnesses as they desired to have heard. This Court, however, in

(1) (1899) I. L. R., 26 Calc., 869.

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Queen-Empress v. *Khushali Ram*, (1) laid down no hard and fast rule upon this point. The learned Chief Justice, who decided that case, held that if a jury required evidence, evidence should be produced before it, and that in that case it was for the Magistrate to show by evidence that the obstruction referred to was an obstruction of a public way or in a public place. So far as I can see, Chapter X does not lay down any rules as to the procedure that must be adopted by a jury. The questions which are now raised are questions which, it appears to me, should have been raised by or on behalf of the firm long ago in the case.

It has been held by a learned Judge of this Court in *In the matter of the petition of Lachman* (2) that a person who applies for a jury is bound by the verdict of the jury and cannot raise such a plea as that the obstruction was caused in the exercise of a *bonâ fide* claim of right. So far as I can judge from the record, the firm of Ram Karan Ram Bilas had long and sufficient notice of the action which the Divisional Magistrate intended to take, and I am not prepared in revision to interfere. I dismiss the application.

APPELLATE CIVIL.

1908
May 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

PABITRA KUNWAR (PLAINTIFF) *v.* THE MAHARAJA OF BENARES (DEFENDANT). *

Procedure—Refusal of Court of first instance to examine all the plaintiff's witnesses—Appeal by defendant decreed—Remand.

Owing to the direction of the Court of first instance only a portion of the evidence available in support of the plaintiff's case was recorded by that Court, which decreed the plaintiff's suit. On appeal, however, the lower appellate Court took a different view of the plaintiff's evidence and dismissed the suit. *Held* that the plaintiff should be given an opportunity of producing the evidence which had not been recorded owing to the attitude taken up by the Court of first instance. *Kifayat-ullah Mondol* v. *Sakina Bibi* (3) and *Kalyani Prasad* v. *Bishnath* (4) referred to.

IN a suit pending in the Court of the Munsif of Benares, owing to the failure of the defendant to comply with an order of

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* Second Appeal No. 685 of 1907, from a decree of G. A. Paterson, District Judge of Benares, dated the 7th of March 1907, reversing a decree of Hira Lal Singh, Munsif of Benares, dated the 21st of December 1906.

(1) (1895) I. L. R., 18 All., 158. (3) (1897) 11 C. W. N., p. xcii.
(2) Weekly Notes, 1900, p. 180. (4) Weekly Notes, 1905, p. 266.

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the Court his defence was struck out. The suit was proceeded with *ex parte*. The plaintiff had produced part of the evidence upon which she relied in support of her claim, when the Munsif intimated that, inasmuch as the suit was undefended, there was sufficient evidence already on the record and passed a decree in favour of the plaintiff. The defendant appealed to the District Judge, who, being of opinion that the evidence recorded was not sufficient to support the plaintiff's claim, allowed the appeal and dismissed the suit, without giving the plaintiff an opportunity, which was asked for, of producing the rest of her evidence. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Babu *Surendra Nath Sen*), for the appellant.

Munshi *Gokul Prasad*, Babu *Sital Prasad Ghosh* and Babu *Satya Chandra Mukerji*, for the respondent.

STANLEY, C. J., and KARAMAT HUSAIN, J.—We think that the learned District Judge was wrong in dismissing the plaintiff's suit without first giving her an opportunity of examining all the witnesses whom she was prepared to examine before the Court of first instance. It appears that by reason of default of the defendant in complying with the order of the Court his defence was struck out and the suit was heard *ex parte*. Before the plaintiff had examined all her witnesses the Munsif intimated that, inasmuch as the case was undefended, there was sufficient evidence already on the record, and passed a decree in favour of the plaintiff. On appeal the learned District Judge was not satisfied that the evidence on the record was sufficient to establish the plaintiff's claim. A representation was made to him that all the evidence which was available had not been produced by the plaintiff before the Munsif. In view of this we think that the learned District Judge ought not to have dismissed the plaintiff's suit, but ought to have remanded the suit to the Court of first instance with directions that it be retried, an opportunity being given to the plaintiff of examining her witnesses and adducing all her evidence. This was the course which was adopted in *Kifayat-ullah Mondol* v. *Sakina Bibi* (1). It is supported by the decision of a Bench of

(1) (1897) 11 C. W. N., p. xcii.

this Court in *Kalyani Prasad* v. *Bishnath* (1). We therefore allow the appeal. We set aside the decrees of both the lower Courts, and we remand the suit through the lower appellate Court to the Court of first instance with directions that it be reinstated on the file of pending suits in its original number and be disposed of on the merits. Costs here and hitherto will abide the event.

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PABITRA KUNWAR *v.* THE MAHARAJA OF BENARES.

Appeal decreed and Cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

1908. *May* 8.

RAM ANANT SINGH AND ANOTHER (PLAINTIFFS) v. SHANKAR SINGH (DEFENDANT).*

Landlord and tenant—Concurrent leases—Landlord entitled to recover rent only as against second lessee.

Held that where a lessor executes two concurrent leases of the same property, that is to say, two leases in which the term of the second commences before the term of the first has expired, the second lessee is to be taken as the assignee of the lessor's interest during the concurrent portion of the terms, and the lessor after the execution of the second lease can recover rent only from the second and not from the first lessee. *Harmer* v. *Bean* (2) followed.

THE plaintiffs in this case were owners of a share in a village called Chingauri in the Mirzapur district. On the 16th of June 1900, they executed a lease of this property in favour of one Raghunath Singh for a term extending from 1308 to 1314 Fasli at an annual rent of Rs. 395. Subsequently, namely, on the 12th of April 1904, the plaintiffs executed another lease of the same property at the same rent, but extending from 1312 to 1320 Fasli, in favour of one Shankar Singh. Under this lease Shankar Singh was authorized to realize the rent from the first lessee Raghunath Singh. Shankar Singh failed to pay the rent due from him for 1312-1313 Fasli and the lessors accordingly sued for its recovery. The Court of first instance (Assistant Collector) gave the plaintiffs a decree. On appeal, however, the District Judge reversed this decree and dismissed the plaintiffs' suits. The plaintiffs thereupon appealed to the High Court.

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*Second Appeal No. 556 of 1907, from a decree of Syed Muhammad Ali, District Judge of Mirzapur, dated the 5th of February 1907, reversing a decree of Kunwar Jagdish Prasad, Assistant Collector 1st class of Mirzapur, dated the 17th of November 1906.

(1) Weekly Notes, 1905, p. 266. (2) (1853) 3 C. and K., 307.

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RAM ANANT SINGH v. SHANKAR SINGH.

Babu *Durga Charan Banerji* and Munshi *Haribans Sahai*, for the appellants.

Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J., and KARAMAT HUSAIN, J.—The facts of this case are these. The plaintiffs are the owners of a share of a village called Chingauri in the district of Mirzapur. On the 16th of June, 1900, they executed a lease of this property in favour of the defendant Raghunath Singh for a term extending from 1308 to 1314 Fasli at an annual rent of Rs. 395. Subsequently, on the 12th of April, 1904, the plaintiffs executed another lease of the same property in favour of the defendant Shankar Singh for a term extending from 1312 to 1320 Fasli at the same rent, namely, Rs. 395. Under this lease Shankar Singh was authorized to realise the rent from the defendant Raghunath Singh. This was what is known as a concurrent lease. Shankar Singh failed to pay the rent for the years 1312—1313 Fasli; and hence the suit was brought out of which this appeal has arisen. The Court of first instance decreed the plaintiffs' claim, but upon appeal the learned District Judge reversed the decision of the Court below and dismissed the plaintiffs' suit on the ground that as long as the lease of 1900 subsists the plaintiffs have no right to maintain a suit for rent against Shankar Singh. He says in his judgment:—"As Raghunath Singh's lease was not cancelled, and as he was not ejected, he remained in possession as thekadar in 1312 and 1313 Fasli, and Shankar Singh was not in possession in those years. I therefore do not see how Shankar Singh can be held responsible for the rent for 1312 and 1313 Fasli." In this view the learned District Judge was in error. The lease of 1904 operated as an assignment of the landlord's interest during the term of the earlier lease of 1900, and thereafter as a lease for the residue of the term granted by it. As assignee of the landlord Shankar Singh was entitled to collect the rent from Raghunath Singh. In the Law of Landlord and Tenant by Mr. Woodfall we find the law thus stated:—"A concurrent lease is one granted for a term which is to commence before the expiration or other determination of a previous lease of the same premises to another person. If under seal, it operates as an assignment of part of the reversion during the continuance of such previous lease, and from henceforth as a lease in possession during

the residue of the term therein expressed to be granted. It entitles the lessee as assignee of part of the reversion to the rent reserved in the previous lease and to the benefit of the covenants therein contained which are to be respectively paid and performed during the then residue of the term granted by the first lease and the continuance of the concurrent lease" (17th Ed., 235). In support of this statement the learned author quotes the decision of a very eminent English Judge, Baron Parke. In the case of *Harmer* v. *Bean* (1) the learned Baron held under very similar circumstances that the operation of a concurrent lease of the kind was to transfer part of the reversion of the landlord to the lessee, and that the landlord after the execution of such concurrent lease could not recover as against the first lessee any rent due after the execution of the concurrent lease. The facts in that case were these: the defendant rented a house from the plaintiff at a rent of £20 quarterly; afterwards the lessor granted a lease by deed to a third party of the house in question and other property for 21 years. It was held that the landlord could not recover the rent due under the first lease after the execution of the second lease. For these reasons we think the learned District Judge was in error, and we therefore, allowing this appeal, set aside his decree and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

(1) (1853) 3 C. and K., 307.

1908.
May 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

RAM LAL (DEFENDANT) *v.* BAHADUR ALI (PLAINTIFF) AND ISMAIL KHAN, (DEFENDANT).*

Pre-emption—Wajib-ul-arz—Construction of documents—Muhammadan law.

The pre-emptive clauses of a wajib-ul-arz contained the following provision:—"The zamindar of the *khalsa* is one person; hence there is no custom of pre-emption in the *khalsa*; but among the owners of the *khalsa* and *milks* the following custom of pre-emption obtains." The *khalsa* subsequently came to have more owners than one. *Held* that no right of pre-emption was given by this wajib-ul-arz to the owners of the *khalsa inter se*, but that a sale of a share in the *khalsa* was subject to the Muhammadan law of pre-emption, and this irrespective of the fact that the vendee was a Hindu. *Gobind Dayal* v. *Inayatullah* (1), *Qurban Husain* v. *Chote* (2) and *Amir Hasan* v. *Rahim Bakhsh* (3) referred to.

THE facts of this case are as follows:—

ONE Ismail Khan on the 9th of December 1900, sold a share in the *khalsa* land of Bazidpur to Ram Lal. Bahadur Ali Khan brought a suit for pre-emption under the Muhammadan law, presumably under the Hanafi school. The vendee raised various defences. The Court of first instance (Subordinate Judge of Moradabad), finding that the vendee Ram Lal was entitled to pre-empt under the wajib-ul-arz and that Bahadur Ali was entitled to pre-empt under the Muhammadan law, gave the latter a decree for half the property in suit on payment of half the price for which it had been sold. Both parties appealed. The District Judge, coming to the conclusion that the custom of pre-emption recorded in the wajib-ul-arz superseded the rules of the Muhammadan law, and finding that Bahadur Ali was a near relation of the vendor, gave Bahadur Ali a decree for all the property in suit and dismissed the appeal of Ram Lal. The vendee Ram Lal thereupon appealed to the High Court.

Mr. *G. W. Dillon*, for the appellant.

Mr. *Abdul Raoof*, for the respondent.

KARAMAT HUSAIN, J.—The facts out of which this second appeal has arisen are as follows:—

One Ismail Khan on the 9th of December 1900, sold a share in the *khalsa* land of Bazidpur to Ram Lal. Bahadur Ali Khan

* Second Appeal No. 1260 of 1906, from a decree of D. R. Lyle, District Judge of Moradabad, dated the 6th of August 1906, modifying a decree of Mohan Lal, Subordinate Judge of Moradabad, dated the 23rd of September 1905.

(1) (1885) I. L. R., 7 All., 775. (2) (1899) I. L. R., 22 All., 102.
(3) (1897) I. L. R., 19 All., 466.

brought a suit for pre-emption under the Muhammadan law, presumably under the Hanafi school. The vendee raised various defences. The Court of first instance, finding that the vendee Ram Lal was entitled to pre-empt under the wajib-ul-arz and that Bahadur Ali was entitled to pre-empt under the Muhammadan law, gave the latter a decree for half the property in suit on payment of half the price for which it had been sold. Both parties appealed. The learned District Judge coming to the conclusion that the custom of pre-emption recorded in the wajib-ul-arz superseded the rules of the Muhammadan law, and finding that Bahadur Ali was a near relation of the vendor, gave Bahadur Ali a decree for all the property in suit and dismissed the appeal of Ram Lal. Ram Lal has preferred this second appeal. The grounds of appeal are :—

(1) The interpretation put upon the wajib-ul-arz is wrong.

(2) The words in the wajib-ul-arz relate to propinquity in space and not propinquity of relationship.

(3) The claim being based on the Muhammadan law, a decree under the wajib-ul-arz could not be passed.

The following facts have been found by the lower appellate Court :—(1) Bahadur Ali is a co-sharer in the *khalsa*; (2) Ram Lal is also a co-sharer in the *khalsa*. The point on which the decision of this appeal turns is the interpretation of the wajib-ul-arz. The material portion of it may be rendered as follows :—

"The zamindar of the *khalsa* is one person; hence there is no custom of pre-emption in the *khalsa*; but among the owners (lit. owner) of the *khalsa* and *milks* the following custom of pre-emption obtains."

On the basis of the above extract from the wajib-ul-arz it is urged for the appellant that the wajib-ul-arz gives no right of pre-emption to the co-sharers in the *khalsa inter se*, but that there is a right of pre-emption between the owners of the *khalsa* and the owners of the *milks* in the sense that if a share in the *khalsa* is sold the owner of the *milk* is entitled to pre-empt. Whatever may be the correct meaning of the last portion of this peculiarly worded clause in the wajib-ul-arz, I can safely say that according to the plain meaning of the first part of the clause, the *khalsa* land is not subject to a claim for pre-emption under the

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wajib-ul-arz. Such being the case, the wajib-ul-arz has no application to the sale of the *khalsa* land, and a suit to pre-empt it can only be instituted under the Muhammadan law.

This leads me to determine the right of the pre-emptor and the vendee under the Hanafi school of Muhammadan law. The property sold belonged to a Muhammadan, and was therefore subject to pre-emption by those who were entitled to pre-empt under that law. The fact that it was purchased by a Hindu makes no difference. He purchased it subject to the right of pre-emption by the plaintiff. See *Gobind Dyal* v. *Inayat ul-lah* (1).

It might, however, be contended that Ram Lal being a Hindu has not a right to pre-empt, although he is a co-sharer in the *khalsa*, but there is no force in this contention. "The principle of reciprocity," as remarked by Aikman, J., in *Qurban Husain* v. *Chote*, (2) "lies at the root of the law of pre-emption" and "according to the Hanafi law it is not necessary that the pre-emptor should be of the same religion as the vendor."

The conclusions at which I thus arrive are that :—

(1) The *khalsa* land in Bazidpur is not subject to the right of pre-emption under the wajib-ul-arz.

(2) The case before us is to be governed by Hanafi law.

(3) Bahadur Ali and Ram Lal both have equal rights of pre-emption in respect of the *khalsa* land.

Following, therefore, *Amir Hasan* v. *Rahim Bakhsh* (3), I set aside the decree of the lower appellate Court and give Bahadur Ali a decree for possession of half of the property in dispute on condition that the plaintiff shall deposit in Court within two months hence the sum of Rs. 734 which is half the purchase money. Ram Lal defendant will pay the costs incurred by the plaintiff in all Courts : on default his suit shall stand dismissed with costs in all Courts.

STANLEY, C.J.—I concur in the views expressed by my learned brother. The wajib-ul-arz which we have to interpret has a most novel provision as to pre-emption, and it is difficult to say what was in the minds of the parties when they agreed to be bound by it. But upon the whole I am disposed to think that the view

(1) (1885) I. L. R., 7 All., 775 (2) (1899) I. L. R. 22 All., 102; at p. 104.
(3) (1897) I. L. R., 19 All., 466.

which has been adopted by my learned colleague is correct. I therefore concur in the proposed order.

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RAM LAL v. BAHADUR ALI.

BY THE COURT.—The order of the Court is that the decree of the lower appellate Court be set aside and that a decree for possession of half of the property in dispute be passed in favour of Bahadur Ali, on the condition that he deposit in Court within two months from this date a sum of Rs. 734. We give Bahadur Ali the costs of this appeal in all Courts in the event of the payment of the said sum within the time aforesaid. In default of payment his suit will stand dismissed with costs in all Courts.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908 *May* 14.

JAGARDEO SINGH (PLAINTIFF) *v.* PHULJHARI AND ANOTHER (DEFENDANTS).*

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, article* 91—*Limitation—Suit for cancellation of a deed—Suit for a declaration that hct transaction evidenced by the deed was fictitious.*

A suit for a declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed. The former kind of suit does not fall within the purview of article 91 of the second schedule to the Indian Limitation Act. *Sham Lall Mitra* v. *Amarendro Nath Bose* (1) and *Petherpermal Chetty* v. *Muniandy Servay* (2) referred to.

THE facts of this case are as follows:—

The plaintiff came into Court alleging that he and his nephew Ramdeo had executed a sale-deed of certain zamindari property in favour of the defendant Musammat Phuljhari on the 27th of June 1899; that the sale was a fictitious transaction and was never given effect to; that it was agreed that Musammat Phuljhari should execute a deed of relinquishment; that a deed was drawn up and signed by her, but she refused to have it registered, and that an application for the registration of the deed made by the plaintiff to the District Registrar was refused. The plaintiff accordingly prayed for a decree directing the registration of the deed of relinquishment. This part of the

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* Second Appeal No. 859 of 1907, from a decree of W. R. G. Moir, District Judge of Jaunpur, dated the 10th of April 1907, reversing a decree of Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 6th of September 1905.

(1) (1895) I. L. R., 23 Calc., 460. (2) (1908) 12 C. W. N., 562.

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claim was subsequently withdrawn. He further prayed that it may be declared that the sale of the 27th of June 1899 was a fictitious transaction and without consideration. In the alternative he prayed that, if the sale transaction was held to be genuine, Rs. 800, the amount of consideration mentioned in the sale deed, should be awarded to him against the defendant. The Court of first instance, (Subordinate Judge of Jaunpur), held that the sale was a fictitious transaction and dismissed the claim. On appeal the District Judge came to the conclusion that the suit was time-barred, having been brought after three years from the date of its execution. and dismissed it. The plaintiff appealed to the High Court.

Munshi *Kalindi Prasad*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondents.

STANLEY, C.J., and BANERJI, J.—The Court below has dismissed the suit of the plaintiff appellant on the ground that it is barred by limitation under article 91 of the second schedule to the Limitation Act. The only question for determination in this appeal is whether that article governs the suit. The plaintiff's case was that he and his nephew Ramdeo executed a sale deed of certain zamindari property in favour of the defendant Musammat Phuljhari on the 27th of June 1899; that the sale was a fictitious transaction and was never given effect to; that it was agreed that Musammat Phuljhari should execute a deed of relinquishment; that a deed was drawn up and signed by her, but she refused to have it registered, and that an application for the registration of the deed made by the plaintiff to the District Registrar was refused. The plaintiff accordingly brought the present suit for a decree directing the registration of the deed of relinquishment. This part of the claim was subsequently withdrawn. He further prayed that it may be declared that the sale of the 27th of June 1899 is a fictitious transaction and without consideration. In the alternative he prayed that, if the sale transaction was held to be genuine, Rs. 800, the amount of consideration mentioned in the sale deed, should be awarded to him against the defendant. The Court of first instance held that the sale was a fictitious transaction and dismissed the claim. On appeal the learned Judge came to the conclusion that the

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suit was time-barred, having been brought after three years from the date of its execution. This view of the learned Judge appears to us to be erroneous. The claim was not to set aside the sale deed, but for a declaration that from its very inception it was a sham transaction. If this was so, there was no necessity for the plaintiff to have the deed set aside, and therefore article 91 of the second schedule to the Limitation Act had no application. This was so held by the Calcutta High Court in *Sham Lall Mitra* v. *Amarendro Nath Bose* (1). We may also refer to the recent ruling of their Lordships of the Privy Council in the case of *T. P. Petherpermal Chetty* v. *R. Muniandy Servay* (2). If article 91 was applicable, the learned Judge should also have determined when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him. This he has not done. As the suit was dismissed on a preliminary ground, and in our opinion that ground is untenable, we allow the appeal, set aside the decree of the Court below and remand the case to that Court under section 562 of the Code of Civil Procedure with directions to re-admit it under its original number in the register and dispose of it according to law on the merits. The appellant will have his costs of this appeal. Other costs will follow the event.

Appeal decreed and Cause remanded.

APPELLATE CRIMINAL.

1908
May 15.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

EMPEROR *v.* LACHMI NARAIN.*

Act No. XII of 1896 (*Excise Act*), *sections* 44 (2), 48 *and* 57—*Definition—Excise Officer—Jurisdiction.*

Held that a head constable is an Excise Officer within the meaning of section 57 of the Excise Act, 1896. *Queen-Empress* v. *Makunda* (3) followed.

On the 11th of September, 1907, one Lachmi Narain was arrested in the Bisraint Bazar, Muttra, by a head constable and a constable on suspicion of having illicit charas in his possession.

* Criminal Appeal No. 276 of 1908, from an order of H. W. Lyle, Sessions Judge of Agra, dated the 9th of November 1907.

(1) (1895) I. L. R., 23 Calc., 460. (2) (1908) 12 C. W. N., 562.
(3) (1897) I. L. R., 20 All., 70.

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On his being searched, some eighteen tolas of charas were discovered tied up in an angochha round Lachmi Narain's waist. Lachmi Narain was taken to the Kotwali, and after some further investigation a report was made by the Sub-Inspector to the Joint Magistrate of Muttra. On this report Lachmi Narain was charged with and convicted of an offence under section 48 of the Excise Act, 1896, and sentenced to three months' rigorous imprisonment and a fine of Rs. 40. Lachmi Narain appealed to the Sessions Judge, who set aside his conviction and sentence upon the ground that under section 57 of the Act no Court could take cognizance of an offence under the Act except on a complaint or report of an Excise Officer. This was an appeal by the Local Government against the order of acquittal passed by the Sessions Judge of Agra.

The Government Advocate (Mr. *A. E. Ryves*) for the Crown.

Babu *Satya Chandra Mukerji*, for Lachmi Narain.

KNOX and AIKMAN, JJ.—This is an appeal by the Local Government from an appellate judgment of acquittal passed by the learned Sessions Judge of Agra. The accused was convicted by a Magistrate of the first class of an offence under section 48 of Act No. XII of 1896. He was sentenced to the maximum term of imprisonment prescribed by the section and to a fine of Rs. 40. On appeal the conviction and sentence were set aside by the learned Sessions Judge of Agra on the ground that under section 57 of the Act no Court can take cognizance of an offence under the Act except on a complaint or report of an Excise Officer. According to the evidence for the prosecution the accused was arrested with eighteen tolas of *charas* in his possession by a police constable and a head constable. They through their official superior brought the case for trial before the Magistrate. The learned Judge held that the police could not institute the proceedings, and that they could only be instituted by an Excise Officer, which term, the learned Judge holds, means the Excise Inspector, or, where there is no such officer in the District, the Collector or Assistant Collector in charge of excise. In our opinion the view taken by the learned Judge is erroneous. He overlooked the provisions of section 44, sub-section (2) of the Act. The learned Government Advocate has called our attention to the

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ruling in *Queen-Empress* v. *Makunda* (1), which fully supports the view for which he contends. We have heard what the learned vakil who appears for the accused could say on his client's behalf. We have also read the evidence. In our opinion it clearly proves an offence under section 48, clause (*e*) of the Excise Act, 1896. We were addressed on the question of sentence. It is apparently the first time that Lachmi Narain has been convicted. He has already been upwards of three weeks in jail and he has paid the fine which was imposed on him. We accordingly allow this appeal, and, setting aside the judgment of acquittal, convict Lachmi Narain of the offence specified above. We sentence him to the term of imprisonment which he has already undergone, and to the fine which he has already paid.

REVISIONAL CIVIL.

1908 *May* 18.

Before Mr. Justice Aikman and Mr. Justice Griffin.

ANANDI KUNWARI (JUDGMENT-DEBTOR) *v.* AJUDHIA NATH (AUCTION-PURCHASER).*

Civil Procedure Code, sections 310*A*, 244 *and* 588—*Question relating to the execution, discharge or satisfaction of a decree—Appeal—Auction-purchaser representative of judgment-debtor, not of decree-holder.*

A purchaser at an auction sale in execution of a decree is the representative of the judgment-debtor, not of the decree-holder. *Manickka Odayan* v. *Rajagopala Pillai* (2) dissented from.

Where therefore a judgment-debtor's application under section 310A of the Code of Civil Procedure had been allowed, it was *held* that no appeal by the auction purchaser would lie, inasmuch as no appeal was given by section 588, nor did the case fall within the purview of section 244 of the Code. *Bashir-ud-din* v. *Jhori Singh* (3) followed. *Kuber Singh* v. *Sahib Lal* (4), *Gulzari Lal* v. *Madho Ram* (5). *Maganlal Mulji* v. *Doshi Mulji* (6) and *Raynor* v. *The Mussoorie Bank Limited* (7) referred to. *Imtiazi Begam* v. *Dhuman Begam* (8) dissented from.

THE facts of this case are as follows:—

One Magan Sahu obtained an *ex parte* decree against Musammat Anandi Kunwari on the 17th of September 1903. In execution of that decree a house was advertised for sale on the

* Civil Revision No. 75 of 1907, from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 25th of May 1907.

(1) (1897) I. L. R., 20 All., 70.
(2) (1907) I. L. R., 30 Mad., 507.
(3) (1896) I. L. R., 19 All., 140.
(4) (1904) I. L. R., 27 All., 263.
(5) (1904) I. L. R., 26 All., 447.
(6) (1901) I. L. R., 25 Bom., 631.
(7) (1885) I. L. R., 7 All., 681.
(8) (1907) I. L. R., 29 All., 275.

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13th of December 1906. On the 11th of December 1906 the judgment-debtor applied to the Court under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside. That application was entertained, and the 2nd of February 1907 was fixed for hearing. On the 12th of December 1906 the judgment-debtor deposited in Court Rs. 99 in part payment of the decretal amount and asked that the sale be postponed for one week, promising at the same time to deposit the balance of the decretal amount within the week. The s[illegible] was postponed to the 20th of December. On that date, the [illegible]gment-debtor not having paid in the balance, the house was [illegible]d and purchased by one Ajudhia Nath Ojha for a sum of [illegible]220. On the 16th of January 1907 the applicant deposited [illegible] Court Rs. 205, together with a sum sufficient to cover the [illegible]per cent. on the purchase money allowed by the provisions [illegible]ection 310A. of the Code of Civil Procedure. This sum with [illegible]e deposit previously made by her was sufficient to satisfy the amount due under the decree. She asked that the sale might be set aside under section 310A. She added a prayer that the sum be held in deposit pending the disposal of her application to have the *ex parte* decree set aside. On the 2nd of February 1907 her application under section 108 was dismissed. The Court of first instance (Munsif of Gorakhpur) held that under the circumstances there had been a sufficient compliance with the provisions of section 310A, and made an order setting aside the sale. Against that order the auction purchaser preferred an appeal to the learned District Judge, who entertained it, and in the result set aside the Munsif's order on the ground that the deposit by the judgment-debtor was not an unconditional one. The judgment-debtor then applied to the High Court for revision of the appellate order of the learned District Judge on the ground that no appeal lay to him from the Munsif's order.

The Hon'ble Pandit *Sundar Lal*, Pandit *Moti Lal Nehru*, the Hon'ble Pandit *Madan Mohan Malaviya*, Dr. *Tej Bahadur Sapru* and Pandit *Brij Narain Gurtu*, for the applicant.

Babu *Jogindro Nath Chaudhri*, for the opposite party.

AIKMAN and GRIFFIN, JJ.—This is an application for revision of an order of the learned District Judge of Gorakhpur

allowing the appeal of an auction purchaser against the order of the Munsif setting aside a sale under section 310A. of the Code of Civil Procedure. The facts out of which this application has arisen are that one Magan Sahu obtained an *ex parte* decree against the applicant on the 17th of September 1903. In execution of that decree a house was advertised for sale on the 13th of December 1906. On the 11th of December 1906 the judgment-debtor, Musammat Anandi Kunwari, applied to the Court under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside. That application was entertained, and the 2nd of February 1907 was fixed for hearing. On the 12th of December the applicant deposited in Court Rs. 99 in part payment of the decretal amount and asked that the sale be postponed for one week, promising at the same time to deposit the balance of the decretal amount within the week. The sale was postponed to the 20th of December. On that date, the applicant not having paid in the balance, the house was sold and purchased by the opposite party Ajudhia Nath Ojha for a sum of Rs. 220. The house is said to be a very valuable one, and from the array of counsel engaged on behalf of the applicant in this Court this would seem to be the case. On the 16th of January 1907 the applicant deposited in Court Rs. 205 together with a sum sufficient to cover the 5 per cent. on the purchase money allowed by the provisions of section 310A. This sum with the deposit previously made by her was sufficient to satisfy the amount due under the decree. She asked that the sale be set aside under section 310A. She added a prayer that the sum be held in deposit pending the disposal of her application to have the *ex parte* decree set aside. On the 2nd of February 1907 her application under section 108 was dismissed. The Court of first instance held that under the circumstances there had been a sufficient compliance with the provisions of section 310A, and made an order setting aside the sale. Against that order the auction purchaser preferred an appeal to the learned District Judge, who entertained it, and in the result set aside the Munsif's order on the ground that the deposit by the judgment-debtor was not an unconditional one. The judgment-debtor has applied to this Court for revision of the appellate order of the learned District Judge on the ground that no appeal

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lay to him from the Munsif's order. In support of the application reliance is placed on the rulings in *Bashir-ud-din* v. *Jhori Singh* (1) and *Kuber Singh* v. *Shib Lal* (2). These rulings support the applicant's contention that no appeal is allowed by law against an order under section 310A. On behalf of the opposite party reliance is placed on the ruling in *Imtiazi Begam* v. *Dhuman Begam* (3), in which a Bench of this Court declined to follow the case reported in I. L. R., 19 All., 140, above referred to, on the ground that the auction purchaser is the representative of the judgment-debtor and that therefore an appeal lay under the provisions of section 244(*c*) of the Code of Civil Procedure. The ruling in 29 Allahabad contains no reference to the decision of this Court reported in I. L. R., 27 All., 263. It appears to us that the learned Judges, whilst holding that the auction purchaser is a representative of the judgment-debtor, omitted to notice that the contest was between the auction-purchaser and the judgment-debtor. They held that the case fell within the provisions of section 244(*c*), on the authority of the Full Bench decision of this Court in *Gulzari Lal* v. *Madho Ram* (4). In that case the contest was between the holder of a mortgage decree and an auction purchaser at a sale held in execution of a simple money decree against a judgment-debtor whose property was ordered to be sold in the suit of the mortgagee. This, it seems to us, is entirely a different case, and clearly falls under section 244(*c*). We agree with the ruling in *Bashir-ud-din* v. *Jhori Singh* referred to above. No appeal is allowed by section 588 of the Code of Civil Procedure from an order under section 310A of that Code. The case in our opinion does not come within section 244 of the Code. It was simply a question between the judgment-debtor and a purchaser at an auction sale. It was immaterial to the decree-holder whether he received his money from a deposit made by the judgment-debtor or from the price paid by a purchaser at an auction sale. The learned advocate for the opposite party strenuously contended that, even when the dispute is between the auction purchaser as representative of the judgment-debtor and the judgment-debtor, the case still falls under section 244(*c*) of the Code of Civil Procedure. Amongst the questions to be determined under

(1) (1896) I. L. R., 19 All., 140.
(2) (1904) I. L. R., 27 All., 263.
(3) (1907) I. L. R., 29 All., 275.
(4) (1904) I. L. R., 26 All., 447.

section 244 are "questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof." Admitting that in the present case there is question relating to the execution of a decree, can it be said that it is a question arising between the parties to the suit or their representatives? In our opinion it cannot. The same view was taken by the Bombay High Court in *Maganlal Mulji* v. *Doshi Mulji* (1), in which the learned Chief Justice said :—"Now here the question is simply between the judgment-debtor and the purchaser of his interest in the land, and can it be said that the auction-purchaser is the representative of a party? Certainly not of the decree-holder; therefore he can only claim to be a representative of the judgment-debtor. I doubt whether he can claim this character. But assuming for the sake of argument he can, it would not aid him; for in our opinion the section does not cover a question between a party to the suit and his representative. Therefore we have not the necessary basis for the application of section 244, and as a consequence we hold no appeal lies, because it is only so far as an order under section 310A comes under section 244(*c*) that it is appealable." We are in agreement with the concluding portion of the above passage. In this view we are supported by what was said in the case of *Raynor* v. *The Mussoorie Bank, Limited* (2). At page 686 of the judgment the learned Judges remark :—"But, apart from other considerations showing that section 244 is not applicable to a proceeding of this character, it is sufficient here to observe that an application cognizable under that section must be an application between the parties, that is to say, between the parties arrayed against each other as decree-holders of the one part and the judgment-debtors or their representatives of the other. But this is not such a question. It is a controversy of two judgment-debtors *inter se*, and the provisions of section 244 do not apply to the determination of such questions." So here, the controversy is between a judgment-debtor and his representative, and we think it would be straining the language of section 244 to hold that such a dispute falls within the scope of that section. The

(1) (1901) I. L. R., 25 Bom., 631. (2) (1885) I. L. R., 7 All., 681; at p. 686.

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learned advocate for the opposite party further contended that in this case the auction-purchaser was a representative of the decree-holder, and in support of this view he relies upon the ruling of the Madras High Court in *Manickka Odayan* v. *Rajagopala Pillai* (1). That ruling supports the learned advocate's contention; but, with all deference to the learned Judges who decided that case, we find ourselves unable to follow them. We are unable to hold that in a case like the present the auction purchaser can be deemed in any way to represent the decree-holder, whose interest in the case closed as soon as he got the money. No appeal is given by section 588 of the Code of Civil Procedure, and for the reasons given above we hold that the case does not fall within the provisions of section 244 of the Code so as to give a right of appeal under that section. The result is that in our opinion the District Judge had no juri-diction to hear the appeal, and we think his order should be set aside. But as under section 622 of the Code we are empowered in a case like this to pass such order as we think fit, we consider it right to make the order setting aside the decree of the lower appellate Court conditional upon the applicant paying into Court for the opposite party, in addition to the sum already paid, interest on the purchase money (Rs. 220) at the rate of 5 per cent. per annum from 17th January 1907 up to this date. On this additional amount being paid in within one month of the date of this order being certified to the Court below, the decree of the learned District Judge will stand discharged and that of the Court of first instance restored. But if the sum be not paid within the time allowed, this application will stand dismissed. We make no order as to costs.

(1) (1907) I. L. R., 30 Mad., 507.

APPELLATE CIVIL.

1908
May 18.

Before Mr. Justice Aikman and Mr. Justice Griffin.

FAZL-UR-RAHMAN AND OTHERS (DECREE-HOLDERS) *v.* SHAH MUHAMMAD KHAN AND OTHERS (JUDGMENT-DEBTORS).*

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, article* 179—*Execution of decree—Limitation—Appeal—Appeal not pressed—Terminus a quo.*

Where there has been an appeal from a decree limitation does not the less begin to run from the date of the final decree in appeal because the appeal may have been dismissed upon the representation of the appellants' counsel that he was unable to support it. *Jeeyangar* v. *Lakshmi Dass* (1) followed. *Hingan Khan* v. *Ganga Parshad* (2) and *Fazal Husen* v. *Raj Bahadur* (3) distinguished.

THIS was an appeal arising out of an application to execute two decrees which were passed on the 8th of March 1901. Against these decrees appeals were preferred to the High Court. When the appeals were called on for hearing, counsel for the appellants informed the Court that he was unable to support the appeals, and they were accordingly dismissed, no costs being awarded to the respondents, as they were not represented. On this judgment decrees were passed by the High Court affirming the decrees of the Lower Court. The application was within time, reckoning from the date of the decrees of the High Court, but would be barred by limitation if time were computed to run from the date of the decrees of the Court of first instance. The Lower Court (Subordinate Judge of Aligarh) held that, as the appeals to the High Court were not supported, time must be held to run from the date of the decrees of the Court of first instance, and accordingly dismissed the application as barred by limitation. Against this order of the Lower Court the decree-holders appealed to the High Court, contending that limitation should be computed as from the date of the dismissal of the appeals by the High Court.

Maulvi *Ghulam Mujtaba* and Maulvi *Muhammad Ishaq*, for the appellants.

Mr. *W. Wallach*, for the respondents.

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* First Appeal No. 218 of 1907 from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 15th of April 1907.

(1) (1907) 16 M. L. J., 393. (2) (1876) I. L. R., 1 All., 293.
(3) (1897) I. L. R., 20 All., 124.

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FAZL-UR-RAHMAN v. SHAH MUHAMMAD KHAN.

AIKMAN and GRIFFIN, JJ.—The sole question raised in this appeal is whether an application for execution presented by the appellants is or is not barred by limitation. The application was to execute two decrees which were passed on the 8th of March, 1901. Against these decrees appeals were preferred to this Court. When the appeals were called on for hearing the learned counsel for the appellants informed the Court that he was unable to support the appeals, and they were accordingly dismissed, no costs being awarded to the respondents, as they were not represented. On this judgment decrees were passed by this Court affirming the decrees of the lower Court. It is admitted that the appellants' present application is within time, if time is reckoned from the date of the decrees of this Court, but would be barred by limitation if time be computed to run from the date of the decrees of the Court of first instance. The lower Court has held that, as the appeals to this Court were not supported, time must be held to run from the date of the decrees of the Court of first instance, and has accordingly dismissed the application as barred by limitation. Against the order of the lower Court the present appeal has been preferred. In our judgment the appeal must succeed. It seems to us that the language of article 179 of schedule II of the Limitation Act is perfectly clear and is in favour of the appellants' contention. That article allows three years from the date of the decree or order, or, where there has been an appeal, from the date of the final decree or order of the appellate Court. There was undoubtedly an appeal in the case before us, and a final decree was passed by the appellate Court. The application is within three years from the date of the final decree. For the respondents reliance is placed upon two decisions of this Court in *Hingan Khan* v. *Ganga Parshad* (1) and *Fazal Husen* v. *Raj Bahadur* (2). In our opinion these cases are distinguishable from the present, as in the former the appeal was withdrawn, and the question which had to be dealt with was as to the time to be allowed for payment of pre-emption money. Moreover, the language of article 179 was not referred to. In the second of these, to which one of us was a party, the appeal abated. It

(1) (1876) I. L. R., 1 All., 293. (2) (1897) I. L. R., 20 All., 124.

appears that the decree-holder in that case appealed against one Hardayal, a judgment-debtor. Hardayal died, and the decree-holder failed to bring on the record his legal representatives. It was held that the only extant decree was the original decree of the Munsif. In the Full Bench case of *Jeeyangar* v. *Lakshmi Dass* (1) the Madras High Court held that when an appeal is entertained and an order made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time for execution runs from the date of the order of the appellate Court. The learned Judges in that case dissented from certain decisions of the Bombay High Court in which an opposite view had been taken. We agree with the opinion expressed by the Full Bench of the Madras High Court. If a judgment-debtor's appeal, as sometimes happens, is pending for upwards of three years, and if it were held that the appellant judgment-debtor, by withdrawing or declining to support his appeal, or by omitting to bring on the record the representatives of a deceased respondent, could, notwithstanding the fact that an appeal had been filed, cause time to run from the date of the original decree, it would in our opinion be going directly against the language of the Limitation Act and would open a door to fraud. We allow the appeal, and, setting aside the order of the lower Court, send back the case to that Court with instructions to re-admit the application under its original number in the register and dispose of it according to law. The appellants will have the costs of this appeal. Other costs will follow the event.

Appeal decreed and Cause remanded.

(1) (1907) 16 M. L. J., 393.

1908.
May 20.

Before Mr. Justice Aikman and Mr. Justice Griffin.

JANGI SINGH (JUDGMENT-DEBTOR) v. CHANDAR MOL (DECREE-HOLDER).*

Act No. XV of 1882 (*Transfer of Property Act*), *section* 90— *Application for a personal decree against mortgagor—Limitation—Act No. XV of* 1877 (*Indian Limitation Act*), *schedule II, article* 116.

Held that the fact that there is no express personal covenant to pay the mortgage money is no bar to the mortgagee obtaining a personal decree under section 90 of the Transfer of Property Act, 1882, against the mortgagor if the requirements of the section are otherwise fulfilled: a personal covenant to pay is implied in and is an essential part of every simple mortgage. *Sawaba Khandapa* v. *Abaji Jotirav* (1) not followed. *Unichaman* v. *Ahmed Kutti Kayi* (2) referred to.

Held also that on an application under section 90 of the Transfer of Property Act it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. *Hamid-ud-din* v. *Kedar Nath* (3) followed.

THE facts of this case are as follows:—

On the 5th of August 1893, Jangi Singh executed a deed of simple mortgage in favour of Chandar Mol. The money was payable on demand. The bond contained no personal covenant to pay. It was a registered instrument. The mortgagee on the 25th of July 1900, instituted a suit for sale on the mortgage and also asked for a personal decree against the mortgagor. On the 16th of August 1900, the mortgagee got an *ex parte* decree for sale. No personal decree was passed against the mortgagor. The property was sold on the 20th of December 1906, and, the proceeds of the sale having proved insufficient to pay the amount due on the mortgage, the decree-holder applied for a decree under section 90. The judgment-debtor raised an objection on the ground of limitation. This was overruled by the Court of first instance (Subordinate Judge of Shahjahanpur) and the decision of that Court was affirmed on appeal by the District Judge. Both the lower Courts found that there had been a payment by the judgment-debtor of interest on the 16th of June 1895, that is to say within six years of the date when the suit was filed. The judgment-debtor appealed to the High Court.

Babu *Surendra Nath Sen* and Babu *Jogindro Nath Mukerji*, for the appellant.

* Second Appeal No. 1174 of 1907 from a decree of C. D. Steel, District Judge of Shahjahanpur, dated the 13th of August 1907, confirming a decree of Achal Bihari, Subordinate Judge of Shahjahanpur, dated the 11th of May 1907.

(1) (1887) I. L. R., 11 Bom., 475. (2) (1897) I L. R., 21 Mad., 242.
(3) (1898) I L. R., 20 All., 386.

Babu *Jogindro Nath Chaudhri* and Babu *Beni Madho Ghosh*, for the respondent.

AIKMAN and GRIFFIN, JJ.—This is an appeal by a judgment-debtor. The question which we have to decide is whether an application made by the respondent for a decree against the appellant under section 90 of the Transfer of Property Act is time-barred. On the 5th of August 1893, the appellant executed a deed of simple mortgage in favour of the respondent. The money was payable on demand. The bond contained no personal covenant to pay. It was a registered instrument. The respondent, on the 25th of July 1900, instituted a suit for sale on the mortgage and also asked for a personal decree against the mortgagor. On the 16th of August 1900, the respondent got an *ex parte* decree for sale. No personal decree was passed against the mortgagor. The property was sold on the 20th of December 1906, and, the proceeds of the sale having proved insufficient to pay the amount due on the mortgage, the respondent applied for a decree under section 90. The appellant raised an objection on the ground of limitation. This was overruled by the Court of first instance and the decision of that Court was affirmed on appeal by the learned District Judge. The judgment-debtor comes here in second appeal. The Courts below have found that there was a payment by the appellant of interest on the 16th of June 1895. That payment was within six years of the date when the suit was filed. On an application under section 90 it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. The learned vakil for the appellant contends, relying on the decision of the Bombay High Court in *Sawaba Khandapa* v. *Abaji Jotirav* (1), that, as there is not in the registered mortgage deed any personal covenant to pay, the respondent is not entitled to take advantage of article 116 of the second schedule of the Limitation Act, which allows a period of six years for a suit for breach of a contract in writing and registered. That decision does support the argument on behalf of the appellant. It was considered in a later Madras ruling in the case of *Unichaman* v. *Ahmed Kutti Kayi* (2). In that case the learned Judges remark :—" If

(1) I. L. R., 11 Bom., 457. (2) (1897) I. L. R., 21 Mad., 242.

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this liablity be taken to be one arising under a covenant implied by law as incidental to the mortgage contract, which was in writing and registered, then article 116 of the Limitation Act would apply, otherwise the appropriate article is 120, the case not being otherwise provided for." The Bombay ruling was distinguished on the ground that when it was decided the Transfer of Property Act was not in force in Bombay. Whether that would be sufficient for distinguishing the Bombay case in the present appeal we are not prepared to say. The facts of this case are on all fours with a case decided by this Court—*Hamid-ud-din* v. *Kedar Nath* (1). That case is against the appellant. It is true that in that case the special plea raised by the appellant was not considered. But we think that a personal covenant to pay, although not expressed, is implied in and is an essential part of every simple mortgage. The respondent's right to a decree under section 90 therefore was a part of and arose out of a contract in writing and registered, and we think that he is entitled to the benefit of article 116. The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

1908 *May* 25.

Before Mr. Justice Aikman and Mr. Justice Griffin.

RANJIT SINGH (DECREE-HOLDER) *v.* BALDEO SINGH AND ANOTHER (JUDGMENT-DEBTORS).*

Civil Procedure Code, section 318—*Act No. XV of* 1877 (*Indian Limitation Act*), *schedule II, article* 178—*Execution of decree—Limitation—Terminus a quo.*

Although the grant of a certificate is a necessary preliminary to an application under section 318 of the Code of Civil Procedure, such application will be barred under article 178 of the second schedule to the Indian Limitation Act, 1877, if not made within three years of the date of the certificate, that is to say, the date of the confirmation of sale. *Basapa* v. *Marya* (2) and *Kashinath Trimbak Joshi* v. *Duming Zuran* (3) dissented from. *Petition of Kishen Singh* (4) referred to.

In this case one Ranjit Singh, on the 20th of November 1897, purchased certain immovable property in execution of a decree

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* Second Appeal No. 985 of 1907 from a decree of H. W. Lyle, District Judge of Agra, dated the 8th of June 1907, reversing a decree of Chajju Mal, Subordinate Judge of Agra, dated the 2nd of February 1907.

(1) (1898) I. L. R., 20 All., 385.
(2) (1879) I. L. R., 3 Bom., 433.
(3) (1892) I. L. R., 17 Bom., 228.
(4) Weekly Notes, 1883, p. 262.

obtained by him against Baldeo Singh and another and the sale was confirmed on the 5th of January 1898. The auction purchaser took no steps to obtain a sale certificate until the 15th of September 1905, and a certificate was granted to him on the 21st of March 1906. On the 3rd of January 1907 he applied under section 318 of the Code of Civil Procedure to be put in possession of the property which he had bought in 1897. The judgment-debtor objected that the application was barred by limitation. This objection was overruled by the Court of first instance, (Subordinate Judge of Agra) but on appeal was sustained by the learned District Judge. The auction purchaser appealed to the High Court.

Munshi *Govind Prasad*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

AIKMAN and GRIFFIN, JJ.—The appellant, on the 20th of November 1897, purchased certain immovable property in execution of his own decree, and the sale was confirmed on the 5th of January 1898. The appellant took no steps to obtain a sale certificate until the 15th of September 1905, and a certificate was granted to him on the 21st of March 1906. On the 3rd of January 1907, he applied under section 318 of the Code of Civil Procedure to be put in possession of the property which he had bought in 1897. The judgment-debtor objected that the application was barred by limitation. This objection was overruled by the Court of first instance, but on appeal was sustained by the learned District Judge. The auction purchaser comes here in second appeal. The only plea argued before us was that the application was not barred. In support of this contention reliance is placed on the decisions of the Bombay High Court in *Basapa* v. *Marya* (1) and in *Kashinath Trimbak Joshi* v. *Duming Zuran* (2). These decisions undoubtedly support the contention of the appellants; but, with all deference to the learned Judges who decided them, we do not find ourselves in agreement with them. We concur with what was said by the dissenting Judge, Kemball, J., in the earlier of the two cases. It is no doubt true that, according to the language of section 318 of the Code, an application under that section cannot be made

(1) (1879) I. L. R., 3 Bom., 433. (2) (1892) I. L. R., 17 Bom., 228.

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until a certificate has been granted under section 316. But section 316 provides that the certificate is to bear, not the date on which it is actually issued, but the date of the confirmation of sale, and in our judgment the certificate must be deemed to have been granted on the date which it bears, just as a decree is deemed to have been passed, not on the date on which it is signed, but on the date on which the judgment was pronounced. We are of opinion that, although the grant of a certificate is a necessary preliminary to an application under section 318, such application will be barred under article 178 of the second schedule to the Limitation Act, if not made within three years of the date on which the certificate is granted, which we take to mean the date it bears, that is, the date of the confirmation of sale. If the auction purchaser delays for upwards of three years in asking for the certificate to which he is entitled he does so at his own risk. It has been held by this Court—see *Petition of Kishen Singh* (1)—that there is no limitation for an application for a sale certificate. If we take it that his right to apply under section 318 arises, not from the date which the certificate bears, but from the date on which it happens to be issued, an auction purchaser might come in with an application under section 318 twenty years after the date when title to the property vested in him. The view which we take now is supported by an unreported decision of our brother Richards in Execution Second Appeal No. 1401 of 1907, decided on the 12th of this month. For the reasons given above we are of opinion that, whatever other right the appellant may have to enforce his title to the property which he bought, the Court below was correct in holding that his application under section 318 is barred. The result is that we dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes., 1883, p. 262.

O.P.W.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

1908
June 5.

PARTAP SINGH (JUDGMENT-DEBTOR) *v.* THE DELHI AND LONDON BANK, Ld. (DECREE-HOLDER).*

Civil Procedure Code, section 503—Receiver—Appointment of receiver to realize amounts of decrees under attachment.

Where a decree-holder had in execution of his decree attached two decrees held by the judgment-debtor against third parties, it was *held* that section 503 of the Code of Civil Procedure gave power to the Court to appoint a receiver to realize the amounts of the attached decrees where it appeared that by so doing the interests of both decree-holder and judgment-debtor would be better protected.

IN this case the Delhi and London Bank, Limited, held a decree against one Partap Singh, for Rs. 35,000. In execution of this decree the Bank attached two decrees held by Partap Singh, the aggregate amount of which was considerably in excess of the Bank's claim. The Bank applied for sale of the decrees. The judgment-debtor presented an application to the Lower Court stating that if the decrees were sold, the result would be that both he and the Bank would be losers, and he prayed the Court to appoint a receiver to realize the amounts of his decrees attached by the Bank. The Court below (Subordinate Judge of Bareilly) agreed with the judgment-debtor that there was very little likelihood of the decrees fetching a suitable price at the auction sale. But he was of opinion that section 503 of the Code of Civil Procedure did not apply to the case and accordingly rejected the application. The judgment-debtor appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

The respondent was not represented.

AIKMAN and KARAMAT HUSAIN, JJ.—This is an appeal from an order of the Court below refusing the appellant's application for the appointment of a receiver. The respondent Bank, which is not represented here, held a decree against the appellant for Rs. 35,000. In execution of this decree the respondent Bank attached two decrees held by the appellant, the aggregate amount of which is said to be upwards of a lakh of rupees. The Bank applied for sale of the decrees. The judgment-debtor presented an application to the lower Court stating that if the decrees were sold, the result would be that both he and

* First Appeal No. 35 of 1907, from an order of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 15th of January 1907.

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PARTAP SINGH v. THE DELHI AND LONDON BANK, LD.

the Bank would be losers, and he prayed the Court to appoint a receiver to realize the amounts of his decrees attached by the Bank. The learned Subordinate Judge in his order under appeal states that the judgment-debtor's case is a pitiable one, as there is very little likelihood of the decrees fetching a suitable price at the auction sale. But he was of opinion that section 503 of the Code of Civil Procedure did not apply to a case like the present, and accordingly rejected the application. In our opinion the opening words of the section are wide enough to cover a case like the present. We accordingly allow the appeal, set aside the order of the lower Court, and remand the case to that Court with instructions to re-admit the application under its original number in the register and adopt proper steps for the appointment of a receiver. We make no order as to costs.

Appeal decreed.

1908
May 21

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

KALLU AND ANOTHER (PLAINTIFFS) *v.* FAIYAZ ALI KHAN AND OTHERS (DEFENDANTS)*

Hindu law—Hindu widow—Money advanced on personal security of widow—Decree against widow binding only on her widow's estate—Res judicata—Civil Procedure Code, section 13.

Where money is lent to a Hindu widow on her personal security, a decree for such a debt and a sale of property late of the widow's husband in execution of such decree binds only the widow's estate, notwithstanding that the original debt may have been incurred for legal necessity. *Dhiraj Singh* v. *Manga Ram* (1) followed.

K and S (two brothers) executed a usufructuary mortgage of their respective shares in certain property. The share of S was then purchased in execution of a simple money decree by D. The share of K was after his death brought to sale in execution of a simple money decree against K's widow and purchased by G. G transferred his rights to R, who was D's brother. D sued for redemption of half the mortgaged property, naming as defendants the mortgagee, the heirs of S, and R. Pending this suit R died and D amended his plaint, claiming redemption of the whole. The heirs of S did not defend this suit, which was decided *ex parte* as against them, and the suit was compromised by D's widow. The heirs of S then, claiming as next reversioners to K on the death of his widow, brought the present suit, seeking to redeem

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*Second Appeal No. 819 of 1906 from a decree of J. H. Cuming, Additional Judge of Aligarh, dated the 2nd of August 1906, confirming a decree of Sheo Prasad, Munsif of Khurja, dated the 19th of August 1905.

(1) Weekly Notes, 1897, p. 67.

half of the mortgaged property. *Held* that the suit was not barred by section 13 of the Code of Civil Procedure, inasmuch as the plaintiffs, though they might have done so, were not bound in the former suit to raise the defence that D was not entitled to redeem more than half of the mortgaged property.

THIS was a suit to recover possession of a half share in 76 bighas and 5 biswas, which was mortgaged by two brothers, Sher Singh and Khaman Singh in 1858. The plaintiffs alleged that the mortgage debt had been satisfied by the usufruct. The brothers are said to have been separate and each is said to have mortgaged his half share of the property. The equity of redemption of Sher Singh was brought to sale in execution of a simple money-decree held by Deokishen and was purchased by Deokishen himself. He died and was succeeded by his widow Musammat Ganga, respondent No. 2. Both the mortgagors, Sher Singh and Khaman Singh also died. Khaman Singh was succeeded by his widow Musammat Gaura, who is also dead. The plaintiffs claimed as heirs to Khaman Singh. Khaman's widow Musammat Gaura executed a simple money bond on the 21st of December 1883 in favour of Deokishen for the sum of Rs. 95. Deokishen got a decree on the bond on the 8th of March 1887. In execution of that decree Gaura's rights and interests in the property mortgaged were sold and bought by one Ganga Prasad. On the 21st January 1889 Ganga Prasad sold these rights and interests to Ram Chandar, brother of Deokishen. On the 17th of March 1892 Deokishen brought a suit to redeem half the property. The defendants to the suit were (1) the predecessor in title of Nawab Sir Faiyaz Ali Khan, respondent No. 1, who had by purchase acquired the rights of the original mortgagees, (2) the plaintiff's brother Ram Chandar, and (3) the present appellants, the heirs of the mortgagors. Ram Chandar died during the progress of that suit, and Deokishen, alleging that he was Ram Chandar's heir, amended his plaint and asked to redeem the whole 76¼ bighas. Only the representative of respondent No. 1 contested the suit. On the 13th September 1898 Deokishen got a decree for redemption of the whole property subject to the payment of Rs. 1,000 to Nawab Sir Faiyaz Ali Khan. Against this decree two appeals were preferred, one by Nawab Sir Faiyaz Ali Khan and the other by Deokishen. Deokishen died during the pendency of the appeals and his widow Musammat

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Ganga was brought on the record as his legal representative. The present plaintiffs were not made parties to the appeals. These appeals ended in a compromise, and a decree on the compromise was passed on the 20th of December 1900. Under the compromise both the appeals were withdrawn. Musammat Ganga was to get Rs. 4,000 and the decree of the lower Court for redemption was to be treated as if it never existed ("kaladam"). The Court of first instance (Munsif of Khurja) dismissed this suit finding that the debt incurred by Musammat Gaura was incurred for legal necessity, and that the sale in execution of the decree against her passed the whole of Khaman Singh's rights. One of the defences to the suit was that the plaintiffs' suit was barred by the decree passed in the suit of Deokishen instituted on the 17th of March 1892. This plea was overruled by the Court of first instance. The plaintiffs appealed against the decree of that Court dismissing their claim, and the respondents filed an objection under section 561 of the Code of Civil Procedure, assailing the finding of the first Court on the question of *res judicata*. The lower appellate Court (Additional Judge of Aligarh) without dealing with the question raised by the plaintiffs' appeal, sustained the objection filed by the respondent No. 1, and, holding that the plaintiffs' suit was barred by section 13 of the Code of Civil Procedure, dismissed it. Against the decree of the lower appellate Court the plaintiffs appealed to the High Court.

Dr. *Tej Bahadur Sapru* and Munshi *Gobind Prasad*, for the appellants.

Mr. *Abdul Majid*, Babu *Jogindro Nath Chaudhri* and Maulvi *Rahmatullah*, for the respondents.

KNOX and AIKMAN, JJ.—This appeal arises out of a suit brought by the appellants to recover possession of a half share in 76 bighas and 5 biswas, which was mortgaged by two brothers Sher Singh and Khaman Singh in 1858. The plaintiffs' allegation is that the mortgage debt has been satisfied by the usufruct. The brothers are said to have been separate and each is said to have mortgaged his half share of the property. The equity of redemption of Sher Singh was brought to sale in execution of a simple money decree held by Deokishen and was purchased by

Deokishen himself. He is dead and is represented by his widow Musammat Ganga, respondent No. 2. Both the mortgagors Sher Singh and Khaman Singh are dead. Khaman Singh was succeeded by his widow Musammat Gaura, who is also dead. The plaintiffs claim as heirs to Khaman Singh. It appears that Khaman's widow Musammat Gaura executed a simple money bond on the 21st of December 1883 in favour of Deokishen for the sum of Rs. 95. Deokishen got a decree on the bond on the 8th of March 1887. In execution of that decree Gaura's rights and interests in the property mortgaged were sold and bought by one Ganga Prasad. On the 21st January 1889 Ganga Prasad sold these rights and interests to Ram Chandar, brother of Deokishen. On the 17th of March 1892 Deokishen brought a suit to redeem half the property. The defendants to the suit were (1) the predecessor in title of Nawab Sir Faiyaz Ali Khan, respondent No. 1, who had by purchase acquired the rights of the original mortgagees, (2) the plaintiff's brother Ram Chandar, and (3) the present appellants, the heirs of the mortgagors. Ram Chandar died during the progress of that suit, and Deokishen, alleging that he was Ram Chandar's heir, amended his plaint and asked to redeem the whole 76¼ bighas. Only the representative of respondent No. 1 contested the suit. On the 13th September 1898 Deokishen got a decree for redemption of the whole property subject to the payment of Rs. 1,000 to Nawab Sir Faiyaz Ali Khan. Against this decree two appeals were preferred, one by Nawab Sir Faiyaz Ali Khan and the other by Deokishen. Deokishen died during the pendency of the appeals, and his widow Musammat Ganga was brought on the record as his legal representative. The present plaintiffs were not made parties to the appeals. These appeals ended in a compromise, and a decree on the compromise was passed on the 20th of December 1900. Under the compromise both the appeals were withdrawn. Musammat Ganga was to get Rs. 4,000 and the decree of the lower Court for redemption was to be treated as if it never existed ("kaladam"). The Court of first instance dismissed this suit, finding that the debt incurred by Musammt Gaura was incurred for legal necessity, and that the sale in execution of the decree against her passed the whole of Khaman Singh's rights. One of

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the defences to the suit was that the plaintiff's suit was barred by the decree passed in the suit of Deokishen instituted on the 17th of March 1892. This plea was overruled by the Court of first instance. The plaintiffs appealed against the decree of that Court dismissing their claim, and the respondents filed an objection under section 561 of the Code of Civil Procedure, assailing the finding of the first Court on the question of *res judicata*. The learned Additional Judge, without dealing with the question raised by the plaintiffs' appeal, sustained the objection filed by the respondent No. 1, and, holding that the plaintiffs' suit was barred by section 13 of the Code of Civil Procedure, dismissed it. Against the decree of the lower appellate Court the plaintiffs have preferred the present appeal.

The first question we have to decide is, whether the sale in execution of the decree on the simple money bond executed by Musammat Gaura was a sale only of her life interest in the property or whether it passed the estate of her deceased husband Khaman Singh. As said above, the learned Munsif decided that the whole estate passed by the sale. In our opinion that decision cannot be supported. When Deokishen lent money to Musammat Gaura in 1883 he chose to do so on her personal security. He did not obtain from her any mortgage of her husband's property. That being so, we hold that any decree which he obtained on his simple money bond could only bind the rights and interests of his debtor on whose personal security he had advanced the money. Musammat Gaura is dead. She had only a widow's estate, and with her death the rights and interests in the property in suit purchased in execution of the decree against her came to an end. In support of this view we may refer to what is said in paragraph 641 of the 7th edition of Mayne's Hindu Law and to the case *Dhiraj Singh* v. *Manga Ram* (1). This disposes of the first issue which we have to decide.

The next question that arises is whether the present suit of the plaintiffs is barred by what took place in the suit for redemption instituted by Deokishen in 1892. It is true that in that suit, by the amendment of his plaint, Deokishen claimed to redeem the whole property. It appears that in that suit no issue was framed

(1) Weekly Notes, 1897, p. 67.

as to whether in point of fact Deokishen did or did not own the equity of redemption, and consequently it cannot be said that the issue as to his owning the whole was "heard and finally decided" by the Court. The learned counsel for the defendant, however, relies on explanation II to section 13 of the Code of Civil Procedure, which enacts that any matter which might and ought to have been made a ground of defence in a former suit shall be deemed to have been a matter directly and substantially in issue in that suit. As we have said, the present plaintiffs did not appear to defend the suit, and the decree was passed *ex parte* against them. The present plaintiffs might in that suit undoubtedly have raised the plea that Deokishen was not the owner of the equity of redemption of the whole of the property. But although they might have raised such a defence, we are of opinion that it was not incumbent on them to do so. It was not necessary for the Court to decide the issue as to the extent of Deokishen's rights to enable it to pass the decree which it did. Deokishen admittedly owned a share in the equity of redemption, and, that being so, he was entitled to redeem the whole. We hold that, this being so, the plaintiffs as representatives of one of the co-mortgagors were not bound in the previous suit to raise the issue as to whether or not Deokishen owned the equity of redemption over the whole. We hold, therefore, that the plaintiffs are not precluded by anything in the previous suit from maintaining their present claim. We have already held on the first question that we have to decide that the property itself did not pass at the sale in execution of the decree obtained against Musammat Gaura, but only her rights and interests. The plaintiffs as the heirs of one of the original co-mortgagors are therefore entitled to maintain this suit for redemption. Issues were remitted to the lower appellate Court to decide two questions of fact, namely, what was the amount secured by the mortgage which it is sought to redeem, and next, whether or not that amount has been discharged by the usufruct of the property. On these issues the lower appellate Court has found, first, that the amount secured by the mortgage is Rs. 425, and next, that the mortgage debt has long ago been discharged by the usufruct. Objections have been filed by the respondent. One objection is

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that on the finding of the lower appellate Court that the mortgage debt has been satisfied long ago out of the usufruct, the suit of the plaintiffs is barred by limitation. This plea, however, was abandoned before us. Another objection has been raised as to the finding of the lower Court in regard to the amount of the mortgage money. The respondents contended that the terms of the wajib-ul-arz of 1890 show that the amount secured by the mortgage was Rs. 1,000. We have examined this wajib-ul-arz and we agree with the construction placed on it by the lower appellate Court. We set aside the decrees of the Courts below and decree the plaintiffs' claim as set forth in relief (*a*) of the plaint. The plaintiffs will have their costs here and in the Courts below.

This case was very ably argued by the learned advocates for the parties, particularly by the learned advocate for the appellants.

Appeal decreed.

1908
May 22.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

COLLECTOR OF MIRZAPUR (PLAINTIFF), *v.* DAWAN SINGH AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 116—Limitation—mortgage—Suit for compensation for the breach of a contract in writing registered.

A registered mortgage bond provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession; further, that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the mortgagee would have power to realise the amount secured by the bond with the interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged.

Held that a suit based upon the foregoing covenant to recover the mortgage money upon failure of the mortgagor to pay instalments was in substance a suit for compensation for breach of contract, to which the limitation prescribed by article 116 of the second schedule to the Indian Limitation Act, 1877, applied. *Husain Ali Khan* v. *Hafiz Ali Khan* (1) referred to.

THIS was a suit to recover the amount of a mortgage bond, dated the 17th of April 1899. It was a registered document,

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* Second Appeal No. 10 of 1907 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 12th of September 1906, modifying a decree of Amjadullah, Subordinate Judge of Mirzapur, dated the 1st of June 1906.

(1) (1881) I. L. R., 3 All., 600.

and provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession. It further provided that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the creditor would have power to realise the amount secured by the bond with interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged. The first instalment was payable on the 16th of December 1899. The present suit was brought on the 15th of December 1905. The Court of first instance (Subordinate Judge of Aligarh) decreed the plaintiff's claim. On appeal, however, this decree was reversed by the District, Judge who dismissed the suit, holding it to be barred by limitation. The plaintiff appealed to the High Court.

Mr. *A. E. Ryves*, for the appellants.

Mr. *Muhammad Raoof*, for the respondent.

STANLEY, C. J. and BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff appellant to recover the amount of a mortgage bond, dated the 17th of April 1899. It was a registered document, and provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession. It further provided that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the creditor would have power to realise the amount secured by the bond with interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged. The first instalment was payable on the 16th of December 1899. The present suit was brought on the 15th of December 1905. The Court below has dismissed the suit, holding it to be barred by limitation, and has referred to the case of *Ram Narain* v. *Kamta Singh* (1) as an authority in support of its view. That ruling in our opinion has no bearing whatever on the present case. That was a suit for arrears of rent, for which there is specific provision in schedule II of the Limitation Act. The present suit is

(1) (1903) I. L. R., 26 All., 138.

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COLLECTOR OF MIRZAPUR v. DAWAN SINGH.

one for money payable under a mortgage bond. As the property mortgaged consisted of mortgagee rights, it was assumed, according to the ruling in force at the time when the suit was brought, that the mortgaged property could not be sold, but there is the clear covenant in the bond that the money would be recoverable in case of default in delivering possession from the person and other property of the mortgagors. This was, in our opinion, a suit which was governed by article 116 of schedule II, being in substance a suit for compensation for breach of contract, namely, the contract to deliver possession and pay the amount secured by the bond in case of default in delivering possession. The bond being a registered instrument, the period of limitation under that article was six years, and the suit was therefore within time. This view is in consonance with the ruling of a full Bench of this Court in *Husain Ali Khan* v. *Hafiz Ali Khan* (1). The result is that we allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts.

Appeal decreed.

1908 *May* 22.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MUL KUNWAR AND OTHER (DEFENDANTS) *v.* CHATTAR SINGH (PLAINTIFF) AND MUSAMMAT NAUGI (DEFENDANT).*

Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 116—*Limitation—Suit for compensation for the breach of a contract in writing registered.*

A deed of sale of immovable property, duly registered, contained a covenant to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages. The purchaser, failing to get possession of part of the property purchased, sued for possession, or in the alternative for a refund of a proportionate part of the consideration money and damages. *Held* that as regards the latter relief the suit was governed by article 116, and not by article 97, of the second schedule to the Indian Limitation Act, 1877.

THE facts out of which this appeal arose are as follows:—

Two brothers, Dip Chand and Lajja Ram, owned certain property. Dip Chand died in 1876 leaving him surviving his sons

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*Second Appeal No. 296 of 1907 from a decree of H. J. Bell, District Judge of Aligarh, dated the 22nd of December 1906, confirming a decree of Pitambar Joshi, Subordinate Judge of Aligarh, dated the 26th of January 1905.

(1) (1881) I. L. R., 3 All., 600.

Kanhaiya Lal and Makhan Lal and a widow Musammat Naugi. The names of these persons were entered in the revenue records in regard to his half share of the property. Lajja Ram died in 1885. His share devolved on his nephews Makhan Lal and Kanhaiya Lal. Makhan Lal died leaving a minor son, Ghanshiam Das, and a widow, Musammat Mul Kunwar. On the 16th of September 1898 Mul Kunwar sold one-half of the property to the plaintiff. On the 10th of January 1899 Kanhaiya Lal sold the other half. The plaintiff applied for the entry of his name in respect of the entire village, but his application was rejected on the 16th of August 1899 as regards the share which was recorded in the name of Musammat Naugi, the widow of Dip Chand. The plaintiff then sued for a declaration of his right and for possession against Naugi, but that suit was dismissed on the 23rd of November 1900. On the 9th of July 1904 he brought the present suit against Musammat Mul Kunwar and her minor son Ghanshiam Das as the principal defendants, and he claimed the following reliefs (1) that possession be awarded over the property, (2) that if possession be not awarded a proportionate part of the consideration for the sale with interest be awarded to him, and in case the first relief was granted, that he might be awarded further damages.

The Court of first instance (Subordinate Judge of Aligarh), granted the second prayer in the plaint, and the decree of that Court was affirmed by the lower appellate Court (District Judge of Aligarh). The defendants Mul Kunwar and Ghanshiam Das appealed to the High Court.

Dr. *Satish Chandra Banerji* and Pandit *Mohan Lal Nehru*, for the appellants.

Munshi *Gulzari Lal*, Babu *Parbati Charan Chatterji* and Babu *Surendra Nath Sen*, for the respondents.

STANLEY, C. J., and BANERJI, J.—The suit which has given rise to this appeal was brought under the following circumstances:—Two brothers, Dip Chand and Lajja Ram, owned certain property. Dip Chand died in 1876 leaving him surviving his sons Kanhaiya Lal and Makhan Lal and a widow Musammat Naugi. The names of these persons were entered in the revenue records in regard to his half share of the property. Lajja Ram died in 1885. His share devolved on his nephews Makhan Lal

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and Kanhaiya Lal. Makhan Lal died leaving a minor son, Ghanshiam Das, and a widow, Musammat Mul Kunwar. On the 16th of September 1898 Mul Kunwar sold one-half of the property to the plaintiff. On the 10th of January 1899 Kanhaiya Lal sold the other half. The plaintiff applied for the entry of his name in respect of the entire village, but his application was rejected on the 16th of August 1899 as regards the share which was recorded in the name of Musammat Naugi, the widow of Dip Chand. The plaintiff then sued for a declaration of his right and for possession against Naugi, but that suit was dismissed on the 23rd of November 1900. On the 9th of July 1904 he brought the present suit against Musammat Mul Kunwar and her minor son Ghanshiam Das as the principal defendants, and he claimed the following reliefs (1) that possession be awarded over the property, (2) that if possession be not awarded a proportionate part of the consideration for the sale with interest be awarded to him, and in case the first relief was granted, that he might be awarded further damages.

The Court of first instance granted the second prayer in the plaint, and the decree of that Court has been affirmed by the lower appellate Court.

The defendants have preferred this appeal, and the first contention raised on their behalf is that the claim is barred by limitation. We may observe that this plea was not set up in either of the Courts below. The contention is that the suit is one for money paid on an existing consideration which has failed, and that therefore article 97 of Schedule II of the Limitation Act applies, and, as the suit was brought after three years from the date on which the plaintiffs' suit against Musammat Naugi was dismissed, this claim is time-barred. We do not think this contention is right. The claim is upon a covenant contained in the sale deed, that covenant being to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages. Now this is clearly a suit on that covenant and for the breach of it, namely, the failure of the defendants to put the plaintiff into possession of the share of the property sold which

was recorded in the name of Musammat Naugi. The claim therefore was clearly one governed by article 116 of schedule II, as the sale deed was a registered instrument.

The next contention is that under the covenant the plaintiff was not entitled to any refund, as he was aware of the title set up by Musammat Naugi at the time of his purchase. This contention also has in our judgment no force. The parties were probably aware of the fact that a part of the property was entered in the name of Musammat Naugi, and it was apparently for that reason that the purchaser took the covenant from the vendor to which we have referred above, which is an absolute covenant.

For these reasons we think the Courts below were right and we dismiss the appeal with costs.*

Appeal dismissed.

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* This case was followed in F. A. f. O. No. 38 of 1908, *Ram Jaggi Rai* v. *Kauleshar Rai*, decided on the 22nd June 1908, the judgment in which is printed below :—

AIKMAN and KARAMAT HUSAIN, JJ.—The plaintiff, who is respondent here, purchased certain landed property from the defendants. The sale deed set out that the property was unincumbered. It contained a covenant that if the vendee should be dispossessed of any portion of it the vendors would repay a proportionate amount of the sale price with interest at 2 per cent. In consequence of a decree obtained by a prior incumbrancer the plaintiff was dispossessed of a portion of the property on the 8th of April 1904. On the 14th of July 1907 he filed the suit in which this appeal arises, to recover from the defendants the proportionate value of the share of the property of which he had been dispossessed together with interest. The Court of first instance dismissed the suit, holding that it fell within article 97 of schedule II of the Limitation Act, which provides a period of three years for a suit to recover money paid upon an existing consideration which afterwards fails, the time from which the period begins to run being the date of failure. The plaintiff appealed. The learned Subordinate Judge allowed the appeal and remanded the case under section 562 of the Code of Civil Procedure for decision on the merits. Against that order of remand the present appeal has been preferred. The learned Subordinate Judge was of opinion that the suit fell within article 116 of the second schedule, which allows six years for a suit for compensation for the breach of a contract in writing and registered. We are clearly of opinion that the suit does fall within that article and that the view taken by the learned Subordinate Judge is right, The cases cited by the learned counsel for the appellants, namely, *Ram Chandar Singh* v. *Tohfa Bharti* (I. L. R., 26 All., 519) and *Hanuman Kamat* v. *Hanuman Mandur* (I. L. R. 19 Calc., 123) are clearly distinguishable. In the case *Tulshi Ram* v. *Murlidhar Chaturbhuj Marwadi* (I. L. R., 26 Bom., 750) it was argued for the

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appellant, whose suit had been dismissed as barred by limitation, that even if article 116 applied, the suit was time barred. The learned Judges did not touch on this plea at all. The decision of the Court below is in accordance with a recent decision of this Court (as yet unreported) in Second Appeal No. 296 of 1907 disposed of on the 22nd of May last. It was there held that a similar suit to the present "was clearly one governed by article 116 of schedule II, as the sale deed was a registered instrument." For the above reasons we are of opinion that the appeal fails, and it is dismissed with costs.

1908 *May* 29.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

HARPAL SINGH AND OTHERS (DEFENDANTS) *v.* LEKHRAJ KUNWAR (PLAINTIFF) AND JANKI KUNWAR (DEFENDANTS).*

Hindu law—Succession—Impartible estate—Estate devised to widow of owner —Suit by reversioner—Compromise—Estate taken by reversioner.

The owner of an impartible estate to which the rule of primogeniture applied died leaving a will which purported to give the whole estate aboslutely to his widow. After the death of the testator the next reversioner sued to recover the estate and pleaded that the will set up by the widow was invalid. The parties to this suit entered into a compromise, the main provisions of the compromise being that the widow should be the "gaddi-nashin" during her life and should give the plaintiff a monthly allowance, and that after the death of the widow the plaintiff or any representative (*kaem makam*) who might be living should be the absolute owner of all the movable and immovable properties possessed by the testator and should occupy the "gaddi". The plaintiff reversioner predeceased the widow.

Held on suit by the widow of this reversioner to recover the estate as against certain other members of her husband's family who were in possession, that the effect of the compomise was that a vested interest in the estate in the character of an impartible estate was, subject to the life interest of the widow, limited to the plaintiff reversioner, and that upon his death the estate descended to his heir according to the rule of primogeniture and not to his widow.

Rani Mewa Kuwar v. *Rani Hulas Kuwar* (1), *Gobind Krishna Narain* v. *Abdul Qayyum* (2), *Bachcho Kunwar* v. *Dharam Das* (3) and *Ram Shankar Lal* v. *Ganesh Prasad* (4)] referred to. *Abdul Wahid Khan* v. *Nuran Bibi* (5) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji* for the appellants.

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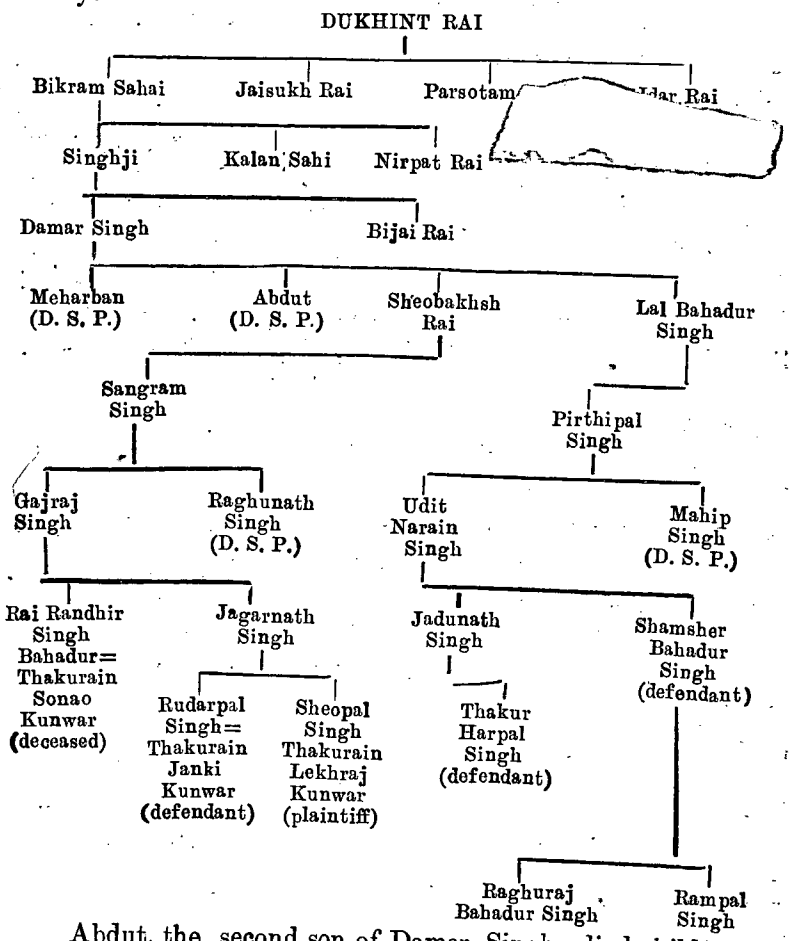
* First Appeal No. 94 of 1906, from a decree of W. R. G. Moir, District Judge of Jaunpur, dated the 24th of February 1906.

(1) (1874) L. R., 1 I. A., 157.
(2) (1903) I. L. R., 25 All., 546.
(3) (1906) I. L. R., 28 All., 347.
(4) (1907) I. L. R., 29 All., 451.
(5) (1885) I. L. R., 11 Calc., 597.

Mr. *B. E. O'Conor* and Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J., and BANERJI, J.—The title to the Singramau estate in the district of Jaunpur, an estate of considerable extent and value, is involved in this appeal. This estate was, up to the date of the death of Rai Randhir Singh on the 4th of January 1895, admittedly impartible. The following genealogical table which is admitted to be correct, will show the relationship of the family.



Abdut, the second son of Damar Singh, died childless in 1795 and was succeeded by his nephew Sangram Singh, and he was succeeded by his eldest son Gajraj Singh, who died in 1857. Rai Randhir Singh, the eldest son of Gajraj Singh, then succeeded

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HARPAL SINGH v. LEKHRAJ KUNWAR.

to the property. Three weeks before his death he executed a will in favour of his wife Thakurain Sonao Kunwar of all his property. His nephew Sheopal Singh was his nearest male relative at the time of his death, and he, on the 28th of March 1896, instituted a suit against Sonao Kunwar for possession of the estate, alleging that Randhir Singh was not of sound and disposing mind when he made his alleged will. He also averred that the estate was impartible and inalienable, and therefore Randhir Singh had no power to dispose of it as he purported to do. This suit was compromised on the 25th of April 1896, and practically the only question which we have to determine is the effect of this compromise.

The learned District Judge delivered a very elaborate and lengthy judgment, but with many of the topics to which he has referred we think it unnecessary to deal. It is admitted that the estate in the hands of Randhir Singh was an impartible estate, and it is also admitted that Sheopal Singh would have succeeded to that estate if no valid disposition had been made of it by Randhir Singh. Therefore it appears to us to be unnecessary to treat of matters prior to the death of Randhir Singh, except so far as they show the circumstances of the family and throw light on the documents which we have to construe.

Sheopal Singh predeceased Musammat Sonao Kunwar, dying on the 27th of July 1899. She died on the 20th of June 1904. Sheopal Singh left a widow, the plaintiff Lekhraj Kunwar, and also a daughter, but no son. Upon his death, if it be held that he acquired under the compromise an absolute interest in the estate it still being an impartible estate, the defendant appellant Thakur Harpal Singh would admittedly be now entitled to it according to the rule of primogeniture. We may here mention that a number of villages were appropriated for the maintenance of the junior members of the family a number of years back. Nine villages were set apart for Pirthipal's branch and four for Sheopal. Of the nine villages five were sold, and the members of the family to whom they belonged have now only exproprietary rights therein. The members of the family are still therefore joint in estate, though they are separate in food and worship. Whatever be the rights of the family in these villages,

they form part of the estate, and if the junior branches become extinct will revert to the head of the family. We may also here mention the fact that the junior members of the family did not live in harmony with the members of the senior branch, but on the contrary there was constant ill-feeling and litigation between them. There is no contest between Harpal Singh and Shamsher Bahadur Singh. They have agreed to divide the estate between them in the event of their appeal being successful. The contest is between them and Thakurain Lekhraj Kunwar, whose case is that Sonao Kunwar under the will of her husband Randhir Singh acquired the property as her *stridhan*, and that under the compromise, in the events which have happened, the property has devolved upon her as the representative of Sheopal Singh. On the death of Sonao Kunwar Harpal Singh got possession of the estate, mutation of names having been effected in his favour.

We now turn to the impeached will of Randhir Singh, which is dated the 15th of December 1894. It opens with a detail of the property which the testator was possessed of, and then follows a recital that the testator has no male issue and that there was no sensible and qualified man in the family to look after and manage the estate and acquire fame; that his nephew Sheopal Singh was separate from him, and that his conduct and manners were quite unworthy and incompatible with the position of a rais and that he had no hopes that he would maintain the reputation of the family. He then appoints his wife Sonao Kunwar "as legatee of my entire estate and every kind of movable and immovable property of which I am in possession up to this time, and Babu Sridat, whom I brought up from a child, as manager," and then he declared that they should hold proprietary possession of his estate and entire movable and immovable property from the date of his death, and that the legatee, that is, Sonao Kunwar, should have every power as proprietor and Babu Sridat should manage the estate in obedience to and with the advice of the legatee. Then the testator gave a direction that the legatee should keep in view the fact that Sheopal Singh was separate and owing to his misconduct the testator did not eat with him, yet that he had set apart some property for his support and that she should continue the support. This is the substance of the will.

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It is unnecessary for us to determine what estate Musammat Sonao Kunwar took under this will, assuming it to have been a valid will, whether she took an absolute estate or merely a Hindu widow's estate. Sheopal Singh at once disputed the will, and on the 28th of March 1896 instituted a suit against Sonao Kunwar and Babu Sridat to have it declared that the will was void and for possession of the estate of Randhir Singh and mesne profits. The plaint in that suit is to be found in First Appeal No. 25 of 1903, No. 11C of the record. In the first paragraph of it the estate of Singramau is described as impartible and untransferable, the custom of the family being that the senior male member is the occupant of the gaddi while the rest of the members are recipients of maintenance, and that on the death of an occupant of the gaddi no right to the estate passes to the widow, but that the eldest son succeeds him and supports all the members of the family with the income of the estate. In the second paragraph the succession is traced from Dukhint Rai to Randhir Singh. Then the fifth paragraph contains an allegation that when Randhir Singh was in a weak and dying condition he was brought to Jaunpur, so as to be taken to Ajudhiaji so that he might end his days there, and that when he was in this condition the defendants obtained from him the will in favour of Musammat Sonao Kunwar. Then follows an allegation that on account of old age, weakness and illness Randhir Singh was quite incapable of forming a rational judgment in respect of his affairs and incapable of making a will. In the sixth paragraph is the allegation that on the death of Randhir Singh, according to old custom and the nature of the property, and also by right of survivorship, the right to occupy the gaddi and take possession of the entire property passed to the plaintiff. Before the institution of this suit Sonao Kunwar had, on the 21st of June 1895, applied for probate of the will of Randhir Singh, and this application was opposed by Sheopal Singh. The suit of Sheopal Singh was compromised, and it is upon the true construction of the compromise that the real question in this appeal depends. The translation of it in the paper book before us has been accepted by both sides, and with the exception of a few words in it which might be otherwise and better translated, and to which we shall presently refer, it appears to be substantially accurate. In view

of its importance we give it *in extenso:* it runs as follows:—

"In the above case a compromise has been effected between the parties in the following way:—

"1. The name of Musammat Thakurain Sonao Kunwar will continue to be recorded in the revenue papers in the same way in which it stands recorded and she will remain in possession during her life-time of all the movable and immovable properties of which Rai Randhir Singh was in possession, exercising the po[illegible] of gaddi-nashin (occupant of gaddi) without the power [illegible] or charge the estate in any way.

"2. I, Thakur Sheopal Singh, will take the sum of [illegible] 12,000 a year at the rate of Rs. 1,000 per month from Musammat Thakurain Sonao Kunwar for all my expenses, and I, Musammat Thakurain Sonao Kunwar, will pay the same. I, Thakur Sheopal Singh, will not interfere with the estate in any way in the life-time of Musammat Sonao Kunwar. After the death of Thakurain Musammat Sonao Kunwar, I, Thakur Sheopal Singh or any representative of mine who may be living at that time, will be the absolute owner of all the movable and immovable properties possessed by Rai Randhir Singh and will occupy the gaddi. In case of non-payment of the fixed annual allowance, I, Thakur Sheopal Singh, will have power to recover the same by instituting a suit and attaching the profits and movable property belonging to Thakurain Sonao Kunwar.

"3. If I, Thakur Sheopal Singh, have to go to any member of the brotherhood, or any rais on the occasion of any ceremony or otherwise, I will have authority to take as much equipage belonging to the estate as I require, and when I go out for recreation *et cetera,* I will take any conveyance I like for my use. Thakurain Sonao Kunwar will have no power to forbid me.

"4. If on any particular occasion any indispensable necessity arise in the estate and it be necessary to take a loan, we, Thakur Sheopal Singh and Musammat Thakurain Sonao Kunwar, will, in concurrence with each other, borrow five or ten thousand rupees and repay the same gradually from the profits of the estate.

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"5. I, Thakurain Sonao Kunwar, also accept all the aforesaid conditions. It is therefore prayed that the case may be struck off as a contested one on the basis of this compromise and the costs incurred by the parties be charged against themselves. This compromise may be embodied in the decree. Musammat Thakurain Shankar Kunwar and Sridat *pro formâ* defendants have been exempted.

"The compromise as written is correct."

A decree was passed in the terms of the compromise on the 27th of April 1896.

The contention on behalf of the defendants is that under this compromise a vested interest in the estate in the character of an impartible estate was, subject to the life estate of Musammat Sonao Kunwar, limited to Sheopal Singh, and that upon his death it passed to his next heir according to the rule of primogeniture and not to his widow. On the other side the contention is that the compromise maintained the possession of Musammat Sonao Kunwar under the will, with a restriction only on alienation imposed upon her: that the impartibility of the estate was destroyed by the will of Randhir Singh, and that Sonao Kunwar held the estate as an estate governed by the ordinary rules of Hindu law, and that upon her death, Sheopal Singh having predeceased her, it devolved on the plaintiff respondent as his personal representative.

The learned District Judge held that Musammat Sonao Kunwar took an absolute alienable estate in the property under her husband's will, and that apart from the compromise Sheopal Singh had no title whatever; that any right which he acquired was acquired under, and was referable to, the compromise. His views are thus expressed in the judgment:—"If the question arises under what title A took what was awarded to him under a compromise of doubtful rights between himself and B, it must be ascertained which was the better title before the compromise to the estate awarded to A, A's or B's. The decision of this point will not alter the fact that A took the estate allotted to him under the compromise, but it will determine whether A took it under his own antecedent title or by virtue of the abandonment by B of his antecedent title. We have then to apply this reasoning

to the compromise between Musammat Sonao Kunwar and Sheopal Singh. It has been found that Musammat Sonao Kunwar had an absolute alienable estate and hence that Sheopal Singh had no title whatever in himself except a contingent title in the event of Musammat Sonao Kunwar dying without alienating the estate by gift or devise. Had he survived Musammat Sonao Kunwar, whatever he took under the compromise he would have taken not under his own supposed title as owner, which had no existence, nor even as a reversioner to a widow's estate, which was not the title he set up, for this title too had no existence, but by virtue of Musammat Sonao Kunwar's abandonment of her rights as absolute owner. This was a title arising out of the compromise only—a title by contract, and not a title based on Sheopal Singh's antecedent right."

Does this accurately represent the facts and is the exposition of the law laid down by the learned District Judge correct? If the will of Randhir Singh was not valid, then on the death of Randhir Singh Sheopal Singh became entitled to the estate as his successor. Sheopal Singh impeached the will of Randhir Singh on the ground that Randhir Singh was not a competent testator, and also on the ground that the estate was not merely impartible but inalienable. He claimed the estate as the successor of Randhir Singh according to the rules of primogeniture and he claimed it as an impartible estate. Whether he had sufficient grounds for impeaching the will it is not, we think, material to consider. But in view of the circumstances under which the will was made it would be difficult to hold that his suit was without foundation. The will was made shortly before the death of Randhir Singh, who was a decrepit old man of 74 years of age in a dying condition. The learned District Judge went behind the compromise. He determined what the rights of the parties were before the compromise, the very thing the avoidance of which led to the compromise. He determined the dispute which the parties designedly left undetermined, and held in effect that the will was a valid will and binding on Sheopal Singh, overlooking the fact that Sheopal Singh withdrew his opposition to the will on the faith of the compromise. If Sheopal Singh had not

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withdrawn his opposition, it is impossible to say what would have been the result of his suit or of the probate suit.

Now let us see what the provisions of the compromise were, bearing in mind the circumstances which led up to it. It provides in the first paragraph that Sonao Kunwar shall remain in possession of the estate during her life-time "exercising the powers of gaddi-nashin," and in the next paragraph, in which an annuity of Rs. 12,000 a year is provided for Sheopal Singh during the life of Sonao Kunwar, it is provided that after the death of Sonao Kunwar Sheopal Singh will be the absolute owner of the estate and will occupy the gaddi. The words gaddi-nashin and gaddi are only properly applied in connection with an impartible estate, and the use of them in the compromise indicates that the intention of the parties was that the estate should continue impartible, as it had been for generations. In other words, the compromise was a recognition by Sonao Kunwar of the claim put forward by Sheopal Singh that the estate was impartible. Sheopal Singh on his part made this concession to Sonao Kunwar that during her life, subject to the payment of the annuity and to certain other restrictions, she should remain in possession and exercise the powers of gaddi-nashin. It seems to us that by the compromise the parties agreed that the estate should retain its old character of impartibility.

But it is argued that, inasmuch as letters of administration of the estate of Randhir Singh with the will annexed were subsequently granted to Sonao Kunwar, it must be taken that the will had full operation, and that by it the impartible nature of the estate was destroyed, and that, whatever was the interest which Sheopal Singh acquired under the compromise, that was an interest in an estate which was no longer impartible, but an estate governed by the ordinary rules of Hindu law. As to the grant of letters of administration what happened was this. After the execution of the compromise Sheopal Singh withdrew him opposition to the grant of letters of administration with the will annexed. He filed a petition on the 25th of April 1896 in which he stated that he had no objection to the grant, a compromise having been effected. It was no longer any concern to him whether the will was proved or not. His rights were secured by the

Hulas Kuwar, on the ground of heirship to immovable property situate in Rohilkhand and Oudh. By a deed of compromise they agreed to divide the property in certain proportions, and the agreement was carried out in Rohilkhand, but not in Oudh, where the respondent was and continued in possession. After the lapse of nine years from the date of the deed of compromise, the appellant Rani Mewa Kuwar sued for possession of her share of the property in Oudh. The Judicial Commissioner of Oudh decided that the suit was founded on the contract contained in the deed of compromise, or for a breach of it, and was therefore barred by limitation. It was held by their Lordships of the Privy Council that the claim did not rest on contract only, but on a title to the land acknowledged and defined by the contract, which was part only of the evidence of the appellant to prove her case, and not all her case. Their Lordships say, at page 164, referring to the compromise :—" That agreement assumes that the parties were severally claiming by virtue of some right of inheritance the property of Raja Rattan Singh; that there were questions between them which might disturb the rights which each claimed, and it was better, instead of a long litigation, to settle these rights, and they do settle them by arriving at this agreement, which provides that the property shall be held in certain shares and shall be divided according to those shares." Then at page 166, they say :—" The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract only, but upon a title to the land acknowledged and defined by the contract, which is part only of the evidence of the appellant to prove her title, and not all her case." The principle laid down in this case has been adopted in several cases in this High Court.

In the case of *Gobind Krishna Narain* v. *Abdul Qayyum* (1) the title taken under a compromise between persons having mutually exclusive claims was considered. On the death of one Rattan Singh disputes arose between his widow, Raj Kunwar, and Sen Kunwar, the widow of his son Daulat Singh, who had predeceased his father. After the death of the two widows three

(1) (1903) I. L. R., 25 All., 546

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to be his legitimate sons. Gauhar Bibi was in possession of the villages in dispute in the Rae Bareli district at the annexation of Oudh in 1856, and the summary settlement was made with her, and after the general confiscation followed by the restoration and the summary settlement of that year, the settlement of the villages was again made with her. She continued in possession till her death on the 18th of October 1875. In the course of proceedings at the regular settlement litigation took place between the alleged sons on the one side and Gauhar Bibi on the other, resulting in a compromise, by which it was agreed that Gauhar Bibi should during her life-time continue to hold possession and remain proprietor without power of alienation and that after her death the two sons should possess each one half of the property. The two sons predeceased Gauhar Bibi. It was held that upon the true construction of the compromise the title of the sons to succeed was contingent upon their surviving the widow, and that no interest passed to their heirs on their deaths in her life-time. The case came before their Lordships of the Privy Council on appeal from the Judicial Commissioner of Oudh, who held that the effect of the compromise was to give Gauhar Bibi a life interest in the estate, and on the death of Abdur Rahman and Abdus Subhan their heirs took their place and had a right to their property on Gauhar Bibi's death. Their Lordships held that the creation of such a life estate did not seem to be consistent with Muhammadan usage, and that it would be opposed to the Muhammadan law to hold that the compromise created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the life-time of Gauhar Bibi. It will therefore be seen that this decision was based upon Muhammadan law, according to which it is not permitted to limit an estate to take effect after the determination on the death of the owner of a prior estate by way of what is known in English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate. The limitation of such an estate is in no way prohibited by Hindu law, and it appears to us clear upon the true interpretation of the compromise entered into between Sheopal Singh and Sonao Kunwar that Sheopal Singh took an absolute vested estate in the

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claimants to the estate arose, namely, Chattar Kunwar and Mewa Kunwar, the daughters of Sen Kunwar, and Khairati Lal, the son of a daughter of Rattan Singh. The conflicting claims of these parties were settled by a compromise by virtue of which Khairati Lal obtained 7½ annas and Chattar Kunwar and her sister Mewa Kunwar 4¼ annas each out of the property of Rattan Singh. It was contended that Khairati Lal had complete title to the whole of the property subject to the compromise, he being son of Rattan Singh's daughter, and that he made a grant to the two Ranis of more than half the property out of kindly feeling towards them. This argument was repelled as devoid of force. The Bench, of which one of us was a member, held that the parties came together as persons at arm's length, each side claiming the whole estate, through different lines of descent, each side having a good fighting title, and to avoid litigation consented to an amicable division of the disputed estate.

Again in the case of *Bachcho Kunwar* v. *Dharam Das* (1), which was heard by a Bench of which one of us also was a member, the effect of a compromise was also considered. Two persons named Paras Das and Umrao Singh laid claim to property as reversionary heirs of Pardman Kunwar. Their claim was resisted by Dip Chand on the allegation that he was the adopted son of Pardman Kunwar and as such entitled to succeed to his property. A compromise was entered into according to which the right of Paras Das and Umrao Singh to one half of the property was recognized, they mutually abandoning all claims to the other half. It is evident that if Dip Chand failed to establish the validity of his adoption, Paras Das and Umrao Singh would as reversionary heirs have succeeded in their claim to the whole of the property of Pardman Kunwar. If, on the other hand, the validity of the adoption was established, the claim of Paras Das and Umrao Singh was bound to fail. It was held that the compromise and decree passed on it amounted to a recognition by Dip Chand of the rights of Paras Das and Umrao Singh as reversionary heirs, as they had previously asserted them, so far as regards one half of the property, and could not be

(1) (1906) I. L. R., 28 All., 347

regarded as conferring a new and distinct title on them; that Paras Das and Umrao Singh in fact under the compromise acquired a moiety of the property in the capacity of reversionary heirs of Pardman Kunwar and in that capacity alone. Reliance was placed upon the judgment of their Lordships of the Privy Council in the case of *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* referred to above in this judgment.

The same question was considered by another Bench of this High Court, of which also one of us was a member, in the case of *Ram Shankar Lal* v. *Ganesh Prasad* (1). The facts of that case were these. One Munni Lal died leaving certain property, of which his widow Jasodha Kunwar took possession. Jasodha Kunwar died leaving the property by will to her daughter Anpurna, who also died after making a will leaving the property to her husband Ram Shankar Lal. Both the wills provided that the devisee was to pay off certain incumbrances affecting the property. After the death of Anpurna the property was claimed by the reversionary heirs of Munni Lal. But this claim was settled by a compromise by which Ram Shankar Lal gave certain land to the claimants in consideration of their entirely withdrawing their claim to the rest of the property. It was held that the compromise did not convey to Ram Shankar Lal the title of the reversioners, but that he took under the will of his wife. We find in the judgment this observation in reference to the compromise:—"We think that by this deed the executants of it, in view of the trouble and uncertainty which would attend a suit for possession of the property, relinquished their claim to bring such a suit and admitted the title by virtue of which Ram Shankar Lal was then in possession. It did not, in our opinion, clothe Ram Shankar Lal with all the rights which the executants had as reversioners to Munni Lal's estate."

Mr. *O'Conor*, in the course of his ingenious and able argument for the respondents, relied on the ruling in *Abdul Wahid* v. *Nuran Bibi* (2). That was a case between Muhammadans and was governed by Muhammadan law. One Mauzzam Khan died on the 22nd of January 1850 leaving a widow named Gauhar Bibi and also Abdus Subhan and Abdur Rahman who claimed

(1) (1907) I. L. R., 29 All., 451. (2) (1885) I. L. R., 11 Calc., 597.

property, the enjoyment of it being postponed during the life of Sonao Kunwar. We also think that upon the language of the compromise it is not possible to hold that the character of the estate as it had been handed down from father to son for generations was changed. As an impartible estate Sheopal Singh laid claim to it, and the compromise provided that as an impartible estate it should devolve upon him. The concession made to Sonao Kunwar by him was that she should enjoy for her life and sit upon the gaddi as gaddi-nashin, his occupation of the gaddi being postponed. On the death of Sheopal Singh, therefore, the estate in our opinion devolved according to the rules of primogeniture governing impartible estates and did not pass to his widow as an estate governed by the ordinary rules of Hindu law. We therefore think that the suit of the plaintiff ought to have been dismissed. We allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in both Courts.

The objections under section 561 of the Code of Civil Procedure necessarily fail and are dismissed with costs.

Appeal decreed.

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May 29.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Richards.

RAM CHARAN DAS AND OTHERS (PLAINTIFFS) *v.* GAYA PRASAD AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 (Indian Limitation Act), section 19—Limitation—Acknowledgment of debt—Guardian and minor—Capacity of natural guardian to acknowledge a debt on behalf of his ward.

Held by BANERJI and RICHARDS, JJ. (STANLEY, C.J., *dissentiente*) that when a guardian acting within the scope of his authority and for the benefit of a minor makes an acknowledgment of a debt, such acknowledgment is by an agent duly authorized in this behalf and gives a fresh start for the computation of limitation: *Tilak Singh* v. *Chhutta Singh* (1), dissented from. *Chinnaya Nayudu* v. *Gurunatham Chetti* (2), *Sobhanadri Appa Rau* v. *Sriramulu* (3), *Kailasa Padiachi* v. *Ponnukannu Achi* (4), *Subramania Ayyar* v. *Arumuga Chetty* (5), *Annapagauda Tammangauda* v. *Sangadigyapa* (6), *Narendra Nath Sarkar* v. *Rai Charan Haldar* (7), *Beti Maharani* v. *The Collector of Etawah* (8), *Kamla Kuar* v. *Har Sahai* (9) and *Chinnery* v. *Evans* (10) referred to.

Per STANLEY, C. J., The relation of guardian and ward resembles rather that of trustee and *cestui que trust* than that of principal and agent. A guardian cannot be considered the authorized agent of his ward for the purpose of making an acknowledgment of a debt on behalf of his ward within the meaning of section 19 of the Indian Limitation Act. *Matthew* v. *Brise* (11), *Markwick* v. *Hardingham* (12), *Beti Maharani* v. *The Collector of Etawah* (8) and *Chinnery* v. *Evans* (10) referred to.

THE suit out of which this appeal arose was brought to recover the balance, amounting to Rs. 3,358-9-3, of moneys advanced by the plaintiffs to Babu Lal, the father of the defendants. Babu Lal died on the 5th of March 1906 leaving two minor sons, the defendants, and their mother, Musammat Sundar Dei, him surviving. The plaintiffs sought to recover the sum claimed by them out of the assets of Babu Lal in the hands of the defendants. They did not seek to make the defendants personally liable. The defendants pleaded that the suit was barred by limitation.

* First Appeal No. 137 of 1906, from a decree of Raj Nath Sahib, Subordinate Judge of Allahabad, dated the 12th of December 1905.

(1) (1904) I. L. R., 26 All., 598.
(2) (1882) I. L. R., 5 Mad., 169.
(3) (1893) I. L. R., 17 Mad., 221.
(4) (1894) I. L. R., 18 Mad., 456.
(5) (1902) I. L. R., 26 Mad., 330.
(6) (1901) I. L. R., 26 Bom., 221.
(7) (1902) I. L. R., 29 Calc., 647.
(8) (1894) I. L. R., 17 All., 198.
(9) Weekly Notes, 1888, p. 187.
(10) (1864) 11 H. L. C., 115.
(11) (1851) 14 Beav., 341.
(12) (1880) 15 Ch. D., 349.

Against this plea the plaintiffs set up certain acknowledgments made by Musammat Sundar Dei as guardian of the defendants, which, if valid, would admittedly have had the effect of saving limitation. The defendants contended that their mother had no authority to acknowledge on their behalf any liability to pay the debt which was the subject of the suit, and this contention was upheld by the Court of first instance, which accordingly dismissed the suit. The plaintiffs appealed to the High Court.

The Hon'ble Pandit *Sundar Lal*, for the appellants.

The question is whether the natural guardian of a minor can acknowledge a debt so as to extend the period of limitation for the institution of a suit to recover the same under section 19 of the Indian Limitation Act, 1877. The decision of this question turns entirely upon the interpretation of the words "or by an agent duly authorized in this behalf" occurring in explanation 2 to this section. The Allahabad High Court has answered this question in the negative. *Tilak Singh* v. *Chhutta Singh* (1). The Bombay High Court in the Full Bench case of *Annapagauda* v. *Sangadigyapa* (2) took a contrary view. Section 4 of Act No. XIV of 1859 required the signature of the person against whom the acknowledgment was sought to be used. It was not clear whether under that section the agent of a minor could sign an acknowledgment for him. In Act No. IX of 1871 and in the present Limitation Act all doubt on this point has been removed by the addition of the necessary words to the section.

The next question is whether the term "agent" as used in section 19 is limited to the case of an agent appointed by a person *sui juris* to represent him. It is submitted that the term is not used in such a limited sense. In the case of *Beti Maharani* v. *The Collector of Etawah* (3) the Court of Wards constituted under the North-Western Provinces Land Revenue Act of 1873 was held to be an "agent" within the meaning of the corresponding section of the former Limitation Act. The Court of Wards might take charge of the estate of a disqualified proprietor in spite of his protests. It derived no authority from the proprietor to act on his behalf, but by virtue of the provisions of section 206

(1) (1904) I. L. R., 26 All., 598. (2) (1901) I. L. R., 26 Bom., 221.
(3) (1894) I. L R., 17 All, 198.

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of the Land Revenue Act it could acknowledge a debt. Similarly other persons not appointed by the debtor as his agents, have been held to be "agents" competent to acknowledge a debt. Such are *(a)* the managing member of a joint family, *(b)* the guardian of a minor appointed by law, *(c)* the natural guardian of a minor and *(d)* the receiver of an estate appointed by the Court. The powers of a natural guardian are as wide as, if not wider than, those of a guardian appointed by law. See Mayne's Hindu Law, 7th edition, pp. 273 and 283. The guardian is bound to pay the debts due by his ward and is entitled to make part payments towards the same. If it is his duty to make such payments, the legal consequences which are entailed by the provisions of section 20 of Act No. XV of 1877 must follow. A guardian can do anything which is for the benefit of his ward, and in this case the acknowledgment was for the benefit of the wards.

The following cases were also cited :—

Narendra Nath Sarkar v. *Rai Charan Haldar* (1), *Kailasa Padiachi* v. *Ponnukannu Achi* (2), *Bai Bhalli* v. *Narain Lal Dorgabhai* (3), *Chinnery* v. *Evans* (4), *Sobhanadri Appa Rau* v. *Sriramulu* (5) and *Bhasker Tatya Shet* v. *Vigo Lal* (6).

Dr. *Tej Bahadur Sapru*, for the respondents.

The natural guardian of a minor could not be his agent. The relation between guardian and ward was that of trustee and beneficiary. No one could become the agent of another except by the will of that other,—Blackwood's Principal and Agent, p. 34.

It was obvious that the minor could not appoint an agent. Besides, the most important words in explanation 2 to section 19 were "duly authorized in this behalf." An agent duly authorized in this behalf must be a person having authority from his principal to make an acknowledgment of a debt within the meaning of section 19 of the Limitation Act. This could not be said at all of a guardian. It was not enough to say that an acknowledgment by the guardian might be for the benefit of the minor. The test was whether he had any authority to make an acknowledgment. The powers of a natural guardian under the Hindu law were not larger than those of any other guardian.

(1) (1902) I. L. R., 29 Calc., 647.
(2) (1894) I. L. R., 18 Mad., 456.
(3) (1902) 4 Bom., L. R., 812.
(4) (1864) 11 H. L. C., 115.
(5) (1893) I. L. R., 17 Mad., 221.
(6) (1893) I. L. R., 17 Bom., 512.

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gives a definition of the word "signed" as used in the section as meaning "signed either personally *or by an agent duly authorized in this behalf.*" The person who gave the acknowledgment which is relied on by the plaintiffs appellants was Musammat Sundar Dei, the mother and natural guardian of the minor defendants. The appellants based their contention mainly on the ruling of a Full Bench of the Bombay High Court in the case of *Annapagauda* v. *Sangadigyapa* (1), in which it was held, overruling a decision of a Bench of the same Court in *Maharana Shri Ranmal Singji* v. *Vadilal Vakhatchand* (2), that an acknowledgment of a debt by a certificated guardian of an infant would save limitation.

According to the section an acknowledgment must be signed either *personally*, that is, by the person liable to pay the debt or by *his agent duly authorized* in that behalf. It is clear that signature by a guardian is not a signature by the debtor personally, and therefore we must consider whether a natural guardian is an agent duly authorized to give acknowledgments within the meaning of the section.

Let us first see what is the relationship existing between a minor and his natural guardian. The Hindu law vests the guardianship of a minor in the Sovereign as *parens patriæ*. According to Manu:—"The King shall protect the inherited and other property of the minor until he has returned from his teacher's house or until he has passed his minority" (Chapter VIII, section 27). The same is the law in England. The King as *parens patriæ* is the guardian of minors. But from the earliest times the Court of Chancery, representing in the person of the Lord Chancellor the authority of the Sovereign, exercised jurisdiction in the matter of the wardship of infants and the care of their estates. A similar jurisdiction is exercised by the courts in this country. A suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of Court, and the Court acting in the place of the Sovereign may pass such orders generally for the benefit of the minor and the protection of his property as it thinks fit. Necessarily the duty which vests in the Sovereign is delegated to the minor's

(1) (1901) I. L. R., 26 Bom., 221. (2) (1896) I. L. R., 20 Bom., 61.

As to the case of *Chinnery* v. *Evans* there, under an Irish Statute the receiver was bound to make the payment in question. He was not acting as the agent of the mortgagor, but under legislative authority. Similarly in the Privy Council case of *Beti Maharani* v. *The Collector of Etawah* (1) the Court of Wards acted not as an agent, but under a certain Statute. Besides, the remarks of their Lordships of the Privy Council in that case were *obiter*. In any event, that case was no authority for holding that a natural guardian could be an agent within the meaning of section 19 of the Limitation Act. It was submitted that the cases in which it had been held that the manager of a joint family could make a valid acknowledgment stood on a peculiar footing. There the interests were all undivided and identical.

In addition to the cases cited by the learned advocate for the appellants the following cases were also referred to and discussed: *Baijonath Ram Goenki* v. *Hem Chandra Bose* (2), *Lilley* v. *Foad* (3), *Lewin* v. *Wilson* (4), *Chhato Ram* v. *Bilto Ali* (5), *Syed-ud-din Hossain* v. *Lloyd* (6), *Wajibun* v. *Kadir Buksh* (7), *Maharana Sri Ranmal* v. *Vadi Lal* (8), *Subramania Ayyar* v. *Arumuga Chetty* (9) and *Chinnaya Nayudu* v. *Gurunatham Chetti* (10).

The Hon'ble Pandit *Sundar Lal* replied.

STANLEY, C.J.—This appeal was referred to a Full Bench in consequence of the conflict of authority upon the only question involved in it, namely, whether a natural guardian of a minor is competent to give an acknowledgment so as to give a fresh start for limitation within the meaning of section 19 of the Limitation Act. This section runs as follows:—"If before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed." Explanation (2) to the section

(1) (1894) I. L. R., 17 All., 198.
(2) (1906) 10 C. W. N., 959.
(3) (1899) 2 Ch., 107.
(4) (1886) 11 A. C., 639.
(5) (1898) I. L. R., 26 Calc., 51.
(6) (1883) 13 C. L., R., 112.
(7) (1886) I. L. R., 13 Calc., 292.
(8) (1896) I. L. R., 20 Bom., 61.
(9) (1902) I. L. R., 26 Mad., 330.
(10) (1882) I. L. R., 5 Mad., 169.

relations, and of these the father and next to him the mother is the natural guardian. Under the Guardians and Wards Act a guardian stands in a fiduciary relation to his ward (section 20), and as regards the property of his ward he is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of the Act, he may do all acts which are reasonable and proper *for the realization, protection or benefit of the property.* A natural guardian is a trustee with powers of management of his ward's estate, and has as such very extensive powers. But the question before us is not, I think, one in which we have to determine so much the powers of a guardian as the relationship which subsists between a guardian and his ward. Whether in fact that relationship is, in any case, the relationship of principal and agent. Unless the relationship of principal and agent subsists between a natural guardian and his ward, it seems to me that it would be difficult to hold that such guardian can be regarded as an agent within the meaning of section 19 of the Limitation Act.

"The relation of guardian and ward," observed Lord Romilly, M. R, in *Matthew* v. *Brise* (1) "is strictly that of trustee and *cestui que trust.* I look upon it as a peculiar relation of trusteeship, and this appears from the case of the *Duke of Beaufort* v. *Berty.* A guardian is not only a trustee of the property, as in an ordinary case of trust, but he is also the guardian of the person of the infant, with many duties to perform, such as to see to his education and maintenance." Then he quotes Lord Macclesfield's words, namely, "that guardians were but trustees and that the jurisdiction of the Court was grounded upon the general power and jurisdiction which it had over all trustees, and a guardianship is most plainly a trust." The relation of a principal and agent is different. A good deal of the arguments addressed to us dealt with the powers of guardians and managers of Hindu families, and too little, I think, with the words of the Statute which we have to interpret. I take the word "agent" and ask the elementary question—who is an agent? Story (8th Edn., p. 2) defines agency thus:—"In the common language of life he who being competent and *sui juris*

(1) (1851) 14 Beav., 341.

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to do any act for his own benefit or on his own account employs another to do it is called the principal, constituent or employer; and he who is thus employed is called the agent, attorney, proxy or delegate of the principal, constituent or employer. The relation thus created between the parties is termed an agency. The power thus delegated is called in law an authority." The relation of agency exists and can only exist by virtue of the express or implied assent of both principal and agent, except in certain cases of necessity in which such relation is imposed by operation of law. (Bowstead on Agency, 2nd Edn., p. 15; *Markwick* v. *Hardingham*, (1). "An agent," to use the definition contained in the Indian Contract Act, "is a person employed to do any act for another, or to represent another in dealings with a third person". An infant cannot employ such an agent (Indian Contract Act, section 123). Only in a very loose sense of the word can the term agent, as it seems to me, be applied to a person who occupies the position of a trustee. No doubt anyone who does any act for another may be described as agent of that person. But strictly speaking the word agent is used to denote a person who is employed by a principal to act for him generally or to do some particular act only and cannot be properly applied to a trustee. The relationship is not necessarily a contractual one. Agents may be appointed under powers of attorney or in writing or by word of mouth to do acts for their principals. The parties so appointed may act or not as they please. If they do act, the relationship between them and the principals is not contractual.

Let me refer now to the case I have mentioned above, in which it was decided that a guardian appointed under the Guardians and Wards Act can sign an acknowledgment of liability in respect of a debt, or pay part of the principal, so as to extend the period of limitation against his ward. The learned Chief Justice, Sir Lawrence Jenkins, in his judgment quoted the case of *Chinnery* v. *Evans* (2) as establishing the proposition that it was not necessary for the validity of an acknowledgmen by an agent that the relationship should be contractual. By "contractual" I presume he meant that the agent need

(1) (1880) 15 Ch. D., 349. (2) (1864) 11 H. L. C., 115.

not be actually appointed by the party chargeable. In that case a payment made by a receiver appointed under the Irish Statute, 11 and 12 George III, Cap. X, was held to be a payment which took the case out of the Statute of Limitation, 3 and 4 William IV, Cap. XXVII, which requires that such payment should be made by the party chargeable or his agent. The learned Chief Justice also quoted the passage from the judgment of the Judicial Committee in *Beti Maharani* v. *The Collector of Etawah* (1), ending with the words:—"It is difficult to see how a *sarbarahkar* not being guardian can be authorized to admit a personal liability. The point has not been carefully inquired into, and in the absence of accurate knowledge their Lordships will only say that Raj Kunwar's (the *sarbarahkar's*) authority seems very doubtful," and he says:—"It would be straining these words too much to spell out of them an authoritative pronouncement that the guardian of one under disability could be an agent for the purpose of the Limitation Act, but at least it is evident that such a proposition did not strike their Lordships as in any way preposterous." In that case the acknowledgment relied on was by the Court of Wards exercising jurisdiction under the North-Western Provinces Land Revenue Act of 1873. Section 203 of that Act defines the Court's power thus:—"The Court of Wards shall have power to give such leases or farms of the whole or any part of the property under its charge and to mortgage or sell any part of such property and to do all such other acts as it may judge to be most for the benefit of the property *and the advantage of the disqualified holder.*" The learned Chief Justice in his judgment observes:—"There is nothing in the Act which could constitute the Court of Wards the person against whom the debt was claimed; therefore it is only as the agent for Raj Kunwar duly authorized in that behalf that it could have signed the acknowledgment of the debt. The Court's agency was manifestly not contractual, so that we have in this case a further warrant for considering (notwithstanding the decisions to the contrary) whether a guardian can be his ward's agent for the purpose of making a payment that will attract the consequences prescribed in section 20." I may here point out that the Court of Wards,

(1) (1894) I. L. R. 17 All. 198.

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as the receiver in *Chinnery* v. *Evans*, is the creature of the Legislature and derives its authority by Statute. With due deference to the learned Chief Justice, I am wholly unable to agree with him that the Court of Wards was in any sense the agent of Raj Kunwar. It acted under the authority of the Legislature and not under the authority of Raj Kunwar or anybody else. It may be that Raj Kunwar is a clerical error and that the ward Pirthi and not Raj Kunwar was intended. Then, adverting to the question whether a guardian can be his ward's agent, he says:—"In my opinion he can be such an agent, if it can be said he is 'duly authorized in that behalf' and he is 'duly authorized in that behalf,' if, as between himself and his ward, he has a right to make the particular payment." To determine this right we must look to the Guardians and Wards Act. It is provided by the 27th section of that Act that "a guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realization, protection and benefit of the property. Therefore in each case it must be seen whether the particular payment answers this description. If on the facts it appears that it does, then as to that payment the guardian is an agent of the minor duly authorized in that behalf, otherwise he is not." Then, coming to the question whether a guardian's signature to an acknowledgment has any operation under section 19 of the Limitation Act, holding that *Beti Maharani's* case was of special value; as it was there evidently thought that the Court of Wards could give an acknowledgment, by parity of reasoning, he came to the conclusion that "a guardian can sign an acknowledgment for the purposes of section 19 of the Guardians and Wards Acts," subject to the qualification that in each case it must be shown that the guardian complied with the conditions of section 27 of the Guardians and Wards Act and that in each case the guardian's act was for the protection and benefit of the ward's property.

Now the suit of *Chinnery* v. *Evans* arose under the Statute of Limitation, 3 and 4 William IV, Cap. XXVII, which requires that a payment, in order to take a case out of the Statute, must

be made by the party chargeable or his agent, and the question was whether in that case the payment was so made. The payment was made by a receiver appointed under the Irish Statute, 11 and 12 Geo. III, Cap. X, which enacted that "in all cases when one and a half years' interest shall be due, the Courts of Equity upon application in the manner hereinafter mentioned, shall appoint a receiver to receive such parts of the rents of the mortgaged premises as shall be sufficient to pay such arrears of interest, and also the accruing interest of the said mortgage-money, from time to time, one half year when the other shall become due, until the whole of such interest due on the mortgage shall be discharged." The contest in that case was whose agent the receiver was, and it was held that the receiver was the agent of the mortgagor and that any payment made by him in pursuance of the order is payment in law by the legal agent of the person liable to pay. By the act of the Legislature the receiver was appointed the agent of the mortgagor for the purpose of paying interest. We get little help from this case. The learned Chief Justice indeed only relied on it as establishing that the relation of a principal and his agent who gives an acknowledgment of a debt due by the principal need not be contractual. As I have already pointed out, the relation of principal and agent is not necessarily contractual; a person, to take a common illustration, may be appointed by power of attorney to do an act for another, and no contractual relationship arises. The receiver was by the Act of the Legislature appointed agent of the mortgagor to make payments of interest, and therefore the payment was binding on the mortgagor. There is no enactment of the Legislature that a guardian, whether a natural or a certificated guardian, shall be such agent. In the case of a certificated guardian the Legislature empowers such guardian to do such acts as are reasonable and proper for the realization, protection or benefit of the property of his ward. It does not prescribe that he shall be his ward's agent for any purpose. He acts as trustee, not as agent. Then the learned Chief Justice holds that a guardian has authority to give an acknowledgment, not in all cases, but only in cases in which it is shown that his act was for the protection and benefit of the

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ward's property. According to this view the guardian is not the duly authorized agent to give an acknowledgment on behalf of an infant, unless it can be shown by the party who relies on the acknowledgment that the guardian's act was for the protection and benefit of the ward's property. As to the authority of the Court of Wards to give an acknowledgment, the learned Chief Justice was of opinion that the Judicial Committee considered that an acknowledgment by the Court of Wards would operate under section 19, and he seemed to think that there was a close analogy between the case of a guardian appointed under the Guardians and Wards Act and the Court of Wards. I confess that I am unable to see that there is any such analogy. The Court of Wards is created by Statute, and it performs, as it seems to me, the duties of the Sovereign as *parens patriæ* and has very large powers under the North-Western Provinces and Oudh Court of Wards Act, III of 1899, which superseded the earlier Act to which the learned Chief Justice referred, namely, the North-Western Provinces Land Revenue Act of 1873, as it also had under the repealed Act. Section 35 of the later Act provides that "the Court of Wards can mortgage or sell the whole or any part of the property under its superintendence, and may give leases, and may generally pass such orders and do such acts not inconsistent with the provisions of this or any other Act for the time being in force as it may judge to be for the *advantage of the ward or for the benefit of the property.*" In the earlier Act likewise, under section 203, the Court was empowered to do "all such other acts as it may judge to be most for the benefit of the property and *for the advantage of the disqualified proprietor.*" In both these Acts very wide powers are given, not merely for the benefit of the property of the ward but also for his advantage. In the case of the Guardians and the Wards Act these wide powers are not given to a guardian. Section 27 of it only gives power to a guardian of the property to do all acts which are reasonable and proper *for the realization, protection or benefit of the property.*" It is hard to see how the acknowledgment of a debt can be regarded as an act done for the protection or benefit of property. Then it is to be

remembered that the powers of the Court of Wards are conferred by the Legislature and not by the proprietor whose estate is under its management. It seems to me therefore that the case of *Beti Maharani* v. *The Collector of Etawah* throws but little light on the question before us. Then the learned advocate for the appellants relied upon the large powers which the manager of a joint Hindu family possesses in regard to the management of the estate of the joint family and the payment of debts. It appears to me that there is no close analogy between the case of such a manager and that of a natural guardian of a minor. The powers of a manager of a joint Hindu family are based on the oneness or unity of the family. The manager represents the common interests of the family, which is regarded as a corporation, union and undivided interests being the rule. But such a manager is not an agent for the other members of the family. Their Lordships of the Privy Council thus defined his position recently:—"Such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent or of partners; it is much more like that of trustee and *cestui que trust*"—*Anna Malai Chetty* v. *Murugasa Chetty* (1).

Now I have shown that the relation subsisting between a guardian and his ward is not that of principal and agent but that of trustee and *cestui que trust*; that an agency can only exist by virtue of the express or implied assent of both principal and agent, except in certain cases of necessity, and that an infant cannot appoint an agent. What the powers of a guardian generally are is, I think, beside the question when we are called upon to interpret the meaning of a section such as section 19 of the Limitation Act. The section gives a new starting point for limitation in a case where an acknowledgment of liability has been made in writing, signed by the party against whom property or a right is claimed, and the word signed is defined as meaning either personally or *by an agent duly authorized* in this behalf. It is obvious, as I have said, that signature by a guardian is not a

(1) (1903) L. R., 30 I. A., 220, at. p. 228.

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personal signature by his ward, and therefore the question which we have to determine is whether a guardian is an "agent duly authorized in this behalf," that is, to give an acknowledgment. It seems to me that we must interpret "agent" in this section in its ordinary sense, that is, as a person employed by a competent person to give the acknowledgment. In articles 89 and 90 of the second schedule to the Limitation Act we find the word used in its ordinary sense, and it is to be presumed that the same meaning was intended for it in every part of the Act. A guardian is not employed by his ward, and he has not, up to the present at least, been constituted by the Legislature his ward's agent. Then an agent must be authorized to give the acknowledgment. The ward not being competent to appoint an agent cannot give any such authority. A guardian, therefore, cannot, I think, be an agent within the purview of the section. In this case Musammat Sundar Dei, the mother and natural guardian of the minors, did not purport to give the acknowledgment as their agent, but as their guardian, and as such guardian, I am of opinion, she had no authority to give the acknowledgment. She was not an agent duly authorized to give it.

But it is said that a minor may suffer grave injury if it be the case that his natural guardian cannot give an acknowledgment of a debt: that creditors will be compelled to take legal proceedings to enforce their rights to the detriment of the minor and his property. I do not apprehend that any such serious consequences would arise. In any case of difficulty or doubt it is always open to the guardian of a minor to place the minor under the protection of the Court, and I am disposed to think that in the majority of cases the intervention of the Court would be not only desirable but in the highest degree for the interests of minors. If a creditor is forced to take legal proceedings for the recovery of a debt, then, upon the institution of a suit, the minor becomes a ward of Court and the Court when satisfied that the debt is *bonâ fide* and is owing can pass such orders for the payment of it as it thinks fit, and protect the minor's property so far as possible. It would be not unattended with danger to recognize a right in a Hindu mother as guardian of her infant sons to give acknowledgments of debts. A Hindu lady is as a rule

pardanashin and unacquainted with business, and so quite incapable independently of others to protect the property of her minor sons. On whichever side, however, the weight of convenience lies, we are bound by the express words of the Statute, and I see no reason to resile from the view which was expressed by my brother Burkitt and myself in the case of *Tilak Singh* v. *Chhutta Singh* (1). I would therefore dismiss the plaintiffs' suit.

BANERJI, J.—This appeal arises in a suit brought by the plaintiffs appellants to recover money alleged to be due to them by Babu Lal, the deceased father of the defendants, who are minors. It is stated that the dealings between the plaintiffs and Babu Lal continued till the 9th of February 1900. As the present suit was instituted on the 4th of August 1905, it was on the face of it beyond time. The plaintiffs, however, invoke in aid certain payments and acknowledgments made after the death of Babu Lal, in order to take the case out of the operation of the Statute of Limitation, and the question before us is whether those payments and acknowledgments save the operation of limitation.

It appears that after the death of Babu Lal, Musammat Sundar Dei, the mother of the minor defendants, applied to the District Judge of Allahabad for a certificate of guardianship. Her application was granted on condition of her furnishing security. As security was not furnished no certificate issued. Meanwhile the Court permitted Sundar Dei to sell the stock-in-trade of a shop which Babu Lal used to carry on in his life-time and the proceeds of the sale were deposited by her in Court. A part of these proceeds were paid, under the orders of the Court, to the plaintiffs on the 30th of September 1902. Musammat Sundar Dei, as guardian of the minors, also acknowledged liability for the debt due to the plaintiffs. The plaintiffs rely upon this payment by the Court and the acknowledgments made by Sundar Dei.

As for the payment, it cannot in my opinion be of any avail to the plaintiffs. It was not a payment of interest as such within the meaning of the first paragraph of section 20 of the Indian Limitation Act, and even if it was a payment of a part of the

(1) (1904) I. L. R., 26 All., 598.

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debt by the debtors or their agent duly authorized in that behalf, the fact of the payment does not appear in the handwriting of the person making it. It is manifest from the provisions of the section that the part payment must appear in the handwriting of the debtor or his authorized agent. In the present case the payment appears in the handwriting of the District Judge, who was certainly not the agent of the defendants.

There remains the question of the acknowledgments made by Sundar Dei. If they are valid acknowledgments within the meaning of section 19, the claim is not time barred. As Sundar Dei did not obtain a certificate of guardianship, she must be deemed to have acted as the natural guardian of the minors. The question then arises whether an acknowledgment by the natural guardian of a minor is a sufficient acknowledgment within the purview of section 19, and this is the main question to be determined in this case. The course of rulings on the point is not uniform, and the question is not free from difficulty. The Legislature proposes to solve the difficulty by an amendment of the Limitation Act and by declaring such acknowledgments to be valid. The determination of the question before us is therefore necessary only for the purposes of the present case and of cases similar to it. After giving the matter my best consideration, I am of opinion that an acknowledgment by the natural guardian of a minor acting within the scope of his authority as guardian is an acknowledgment within the purview of section 19 and saves the operation of limitation. Under that section the acknowledgment must be made in writing and signed by the party against whom any property or right is claimed "either personally or by an agent duly authorized in this behalf." Is a natural guardian an agent duly authorized within the meaning of the section? It is contended that an agent must be appointed by the principal, and as a minor cannot appoint an agent an acknowledgment of liability cannot be made on behalf of a minor. I am unable to agree with this contention. There may be an agent by operation of law. An agent has been defined to be "a person having express or implied authority to represent or act on behalf of another person" and "the relationship of principal and agent may arise (*a*) by express appointment by the

principal; (*b*) by implication of law from the situation of the parties" (Bowstead's Digest of the Law of Agency, pp. 1 and 11). That it is not necessary that an agent must be appointed by the principal is manifest from the fact that a receiver, an executor, the manager of the Court of Wards and the manager of a joint family can be regarded as agents. And it has been held that these persons are competent to make part payment or to acknowledge a debt which would bind a minor or a ward or the estate in charge of the receiver or executor. In *Chinnery* v. *Evans* (1) it was held that payment by a receiver in charge of the estate of a mortgagor is "payment in law by the legal agent of the person liable to pay." In *Beti Maharani* v. *The Collector of Etawah* (2) their Lordships of the Privy Council were of opinion that an acknowledgment by the Court of Wards saves limitation. They observe:— "If there has been a valid acknowledgment by Ajudhia and also by the Court of Wards, as contended, the right of suit is saved." Further on they say:— "It is difficult to see how a sarbarahkar, not being guardian, can be authorized to admit a personal liability," and they hold that the act of the Court of Wards would bind the ward (p. 208). The Court of Wards not being the party liable for the debt, an acknowledgment of debt by it such as saves limitation can only be an acknowledgment as agent of the ward. This Court has held in *Kamla Kuar* v. *Har Sahai* (3) that an acknowledgment by the Court of Wards gives a fresh start for the computation of limitation. It has also been held that the manager of a joint Hindu family can validly acknowledge debts on behalf of minor members of the family. As under section 21 of the Limitation Act an acknowledgment by one of several partners does not save limitation against another, an acknowledgment by the manager of a joint Hindu family cannot be regarded as an acknowledgment by a partner, and can only be deemed to be an acknowledgment by an agent. The manager of a joint Hindu family is no doubt something more than a mere agent, but for the purposes of an acknowledgment under the Limitation Act his act can only be that of an agent. It is clear that the persons referred to above, none of whom were

(1) (1864) 11 H. L. C., 115. (2) (1894) I. L. R., 17 All., 198.
(3) Weekly Notes, 1888, p. 187.

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appointed by the party liable for the debt, may still be his agents by operation of law.

The natural guardian of a Hindu minor may do all acts which the minor himself could have done, if he were of full age, and the acts of the guardian would be binding on the minor, if they are for his benefit and advantage. A guardian is competent to sell and mortgage the minor's property, if it is necessary to do so in the interests of the minor. The powers of a guardian under the Guardians and Wards Act are similar, and so are the powers of the Court of Wards. It is surely the duty of the guardian, as of the Court of Wards, to discharge the debts of the ward with the income of his estate, in whole or in part, or to pay interest as such in order to keep down the debt. If the guardian pays interest or makes part payment, he does so in the interests of the minor and such payments are binding on the minor. If the payment appears in the handwriting of the guardian it would, in my opinion, save the operation of limitation under section 20 of the Limitation Act, the payment being one by an agent authorized to make it on the minor's behalf. If the guardian can make part payments, he can also acknowledge a debt not already time-barred, if it is in the interests of the minor to do so. As the guardian is not the party liable, he makes part payment or acknowledgment on behalf of his ward and therefore as his agent. And when such payment or acknowledgment is made for the benefit of the minor the guardian acts within the scope of his authority and acts as an agent duly authorized in this behalf. I am unable to see any distinction in principle between a part payment by a guardian and the acknowledgment of a debt by him. In my judgment when a guardian acting within the scope of his authority and for the benefit of a minor makes part payment of a debt or acknowledges a debt, the part payment or acknowledgment is by an agent duly authorized in this behalf and gives a fresh start for the computation of limitation.

The weight of authority is in favour of this view. In *Chinnaya Nayudu* v. *Gurunatham Chetti* (1) it was held by a Full Bench of the Madras High Court that the manager of a Hindu family has the same authority to acknowledge as he has to create

(1) (1882) I. L. R., 5 Mad., 169.

a debt, and this, as I have shown above, he can do as agent of the other members of the family and not as partner.

In *Sobhanadri Appa Rau* v. *Sriramulu* (1) a Bench of the same Court presided over by Muttusami Ayyar, J., held that a guardian has authority to acknowledge a debt on behalf of the minor. In *Kailasa Padiachi* v. *Ponnukannu* (2) the same learned Judge expressed the opinion that "a guardian is legally competent in the ordinary course of management either to acknowledge a debt due by his or her ward or to make a part payment or to pay interest." A similar view was held by Sir Arnold White, C. J., and Benson, J., in *Subramania Ayyar* v. *Arumuga Chetty* (3).

A Full Bench of the Bombay High Court held in *Annapagauda Sangadigyapa* (4) that a guardian appointed under the Guardians and Wards Act can sign an acknowledgment of liability provided it be shown that the guardian's act was for the protection or benefit of the ward's property. An earlier ruling to the contrary was overruled.

The Calcutta High Court in two cases held the contrary view, but in the recent case of *Narendra Nath Sarkar* v. *Rai Charan Haldar* (5) Rampini and Pratt, JJ., held that a guardian of a minor is an agent duly authorized to pay interest upon a debt due by the minor. It is difficult to follow the reasoning by which the learned Judges distinguished the case of part payment from that of acknowledgment in the case of a guardian. If a guardian is the minor's authorized agent in the one case he must be so in the other.

The only case in this Court which is against the appellant's contention is that of *Tilak Singh* v. *Chhutta Singh* (6) in which it was held that part payment by the mother and natural guardian of a minor is not a payment by an agent within the meaning of section 20 of the Limitation Act. With great respect for the learned Judges who decided that case I am unable to agree with them.

That an acknowledgment of a debt by a guardian may be for the benefit and advantage of a minor can admit of no doubt. The present case is an instance in point. Had the mother of the

(1) (1893) I. L. R., 17 Mad., 221.
(2) (1894) I. L. R., 18 Mad., 456.
(3) (1902) I. L. R., 26 Mad., 330.
(4) (1901) I. L. R., 26 Bom., 221.
(5) (1902) I. L. R., 29 Calc., 647.
(6) (1904) I. L. R., 26 All., 598.

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defendants not acknowledged the debt due to the plaintiffs, the property of the minors would at once have been sold, whereas, as the petition of Sundar Dei, dated the 4th of September 1902, shows, a portion of the interest was remitted and the minors were said to have benefited to the extent of Rs. 1,441-7-0. This benefit the minors would not have obtained save for the action taken by their mother and guardian. It is difficult to see how this benefit could be obtained by obtaining a certificate of guardianship and placing the minors under the protection of the Court. In the present case Sundar Dei did apply for a certificate of guardianship, but she was unable to furnish security as required by the Court and therefore the minors could not be placed under the protection of the Court. Upon the evidence on the record I am of opinion that the acknowledgment of the debt due to the plaintiffs by the mother and guardian of the minor defendants was for their benefit, and it was not even hinted in the argument before us that it was not so. No useful purpose would therefore be served by asking the Court below to find whether the acknowledgment was beneficial to the interests of the minors. In my judgment the acknowledgment made by Sundar Dei saves the operation of limitation under section 19 of the Limitation Act, and the Court below was wrong in dismissing the suit on the ground of limitation. I would therefore allow the appeal, and, setting aside the decree of the Court below, remand the case to that Court under section 562 of the Code of Civil Procedure for trial of the other issues raised by the defendants.

RICHARDS, J.—This was a suit to recover a sum of Rs. 3,358-9-3 against the minor defendants as heirs and representatives of one Babu Lal, deceased. The facts are not disputed and are shortly as follows:—

The plaintiffs advanced to Babu Lal, the father of the defendants, a sum of Rs. 35,662-4-3 bearing interest at the rate of 8 annas per cent. per mensem. During his life-time Babu Lal paid up Rs. 32,350-8-0 leaving Rs. 4,221-8-0 still due for principal and interest at his death. Babu Lal was possessed of a considerable amount of property, and he died on the 5th of March 1906, leaving his minor sons, the defendants, and his widow Musammat Sundar Dei him surviving. The minor defendants became

entitled to the property left by Babu Lal as his heirs. The decree claimed is only against the assets of the deceased in the hands of the minor defendants. The plaintiffs do not seek to make the minor defendants personally liable. Musammat Sundar Dei applied for a certificate of guardianship of the minors, and her application was granted by the District Judge of Allahabad, but subject to a condition that she would give security for the due administration of the property of the minors. Musammat Sundar Dei was never able to fulfil the condition as to security, with the result that her appointment fell through and we must regard her as simply the natural guardian of the minors.

Meantime efforts were being made to arrange the debts due to the plaintiffs and others. Musammat Sundar Dei presented a petition to the District Judge clearly admitting the debt. Babu Lal had carried on a shop business in his life-time, and Musammat Sundar Dei, with the approval of the District Judge, sold some of the property. The amount realized was brought into the Court of the District Judge, and on the application of Musammat Sundar Dei was paid over to the plaintiffs in reduction of their debt. In the course of these proceedings Musammat Sundar Dei more than once admitted the debt. The plaintiffs abandoned part of the interest due, and the debt was thus reduced by a sum of Rs. 2,003-6-1. This payment was made before the period of limitation had expired and within three years of the institution of the suit. The debt was no doubt reduced both as to principal and interest, but the fact of the part payment of the principal does not appear "in the handwriting" of Musammat Sundar Dei, and the learned advocate for the appellants did not contend that the facts amounted to a payment of interest "as such" by Musammat Sundar Dei and was apparently content to rest his case on the provisions of section 19 of the Limitation Act. Musammat Sundar Dei on behalf of the minors on numerous occasions admitted the debt due to the plaintiffs, and it is not disputed that, if her acknowledgment could legally bind the minors, the acknowledgment which she in fact made was amply sufficient to prevent the debt being barred by limitation. The proceedings in the District Judge's Court were not regular, and I only refer to them because they demonstrate that all parties

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were acting *bonâ fide* in the interests of the minors and their property. The minor defendants plead limitation, and say that they are not bound by the acknowledgments made by their mother. Musammat Sundar Dei was the natural guardian of the minors according to Hindu law. Beyond all question she acted throughout in the interests of the minors. If the debt had not been reduced and if the guardian had not made acknowledgments, but had taken up a hostile attitude and put the plaintiffs at arm's length, the latter would unquestionably have at once sued the minors. The mother was anxious, and properly anxious, to avoid a suit by the plaintiffs, and for this reason she entered into the negotiations in the course of which the payments were made and the acknowledgments were given, and as the result a suit was averted. I hold that Musammat Sundar Dei acted in the interests of and for the benefit of the minors whose natural guardian she was.

According to Hindu law the powers of a natural guardian acting *in the management of the minors' property* and in the interests of the minors are practically unlimited. The guardian can sell or mortgage the minors' property, and in my opinion a natural guardian could certainly legally pay a debt of the minors and obtain a good discharge. Indeed, it seems to me that if a natural guardian neglected to pay a just debt of the minor and allowed a suit to be brought he would be acting contrary to his clear duty. Section 20 of the Limitation Act provides that when interest on a debt or legacy is before the expiration of the prescribed period paid as such by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, or when part of the principal of a debt is before the expiration of the prescribed period paid by the debtor or by his agent duly authorized in this behalf, a new period of limitation should be computed. Provided that in the case of part payment of the principal of the debt the fact of the payment appears in the *handwriting of the person* making the same. As already pointed out, the learned advocate for the plaintiffs does not rest his case on section 20, but I quote the section as I think a consideration of its provisions helps us to consider the provisions of the preceding section 19. Had Musammat Sundar Dei made a payment of interest *as*

such, or if the [illegible]ct of part payment of the principal appeared in her handwriting, [illegible] think it could h[illegible]ly have been said that the payments were not [illegible]ade by the d[illegible] authorized agent of the minors within the [illegible]eaning of the se[illegible]on. The guardian was the person empowere[illegible] Hindu law to [illegible]nage the minors' property, and in a case lik[illegible] present w[illegible] duty to make the payment. Indeed, it seems [illegible] that [illegible] well be said that the act of the guardian was in law [illegible] minors themselves. I think it necessary that we sho[illegible] that we are applying the provisions of an Indian [illegible] which could never arise in England, but wh[illegible] arise [illegible] day in India. Under the Law in England the entire estate of a deceased person vests in his executor or administrator, and the executor or administrator, although he may have no beneficial interest whatever in the estate, is bound to pay the debts of the deceased to the extent of the assets and can certainly make a part payment or give an acknowledgment so as to prevent a debt being barred by limitation. It would make no difference that the persons beneficially interested in the estate were minors or under any other disability. We must, however, assume that under the circumstances of the present case the plaintiffs cannot claim the benefit of section 20.

Section 19 provides:—If, before the expiration of the period prescribed for a suit, an acknowledgment of liability has been made in writing signed by the party or by some person through whom he derives title, a new period shall be computed." Two explanations follow, and explanation 2 is as follows:—

"In this section signed means either personally or by an agent duly authorized in this behalf."

It may be noted that the word "agent" only appears in the explanation, it does not appear in the section proper. The old Act XIV of 1851 did not contain explanation II. It is clear therefore that explanation II was added to the section not for the purpose of restricting the section as it originally stood, but to point out that the acknowledgment mentioned in the section might not only be signed by *the person* but might also be signed by a lawfully authorized agent. I do not think that the word "personally" in explanation 2 of section 19 renders the

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construction that ought to be given to section 19 different to the contruction that ought to be given to section 20 in the case of action through agents. The word was only introduced for the purpose I have mentioned and to draw a contrast between a person acting without an agent and a person acting through an agent.

It is contended on behalf of the defendants that a minor cannot appoint an agent, and that therefore, no matter how *bonâ fide* the action of their natural guardian may have been, they are not bound by her acknowledgment. A minor may himself appoint an agent, but the question is—can there be a legally constituted agent within the meaning of the section without appointment? Suppose Babu Lal had died leaving (as he did) a debt due to the plaintiffs and a widow and minor sons, and suppose in order to avoid a suit the widow as guardian of the minors had regularly paid the interest as such, surely the assets of the deceased in the hands of the minors would be liable for the debt of the deceased and the creditors could rely on the provisions of section 20 without having occasion to institute a suit the moment Babu Lal was dead. If such a payment would bind the minors, it could only bind them because the action of their guardian was either in the eye of the law *their* action or because she was their legally authorized agent *within the meaning of the section.* If such a payment would bind the minors, in my opinion they are equally bound by their guardians' acknowledgment, provided it was given for their benefit. The only distinction in my opinion is that a part payment of principal or the payment of interest would perhaps more frequently be considered for the benefit of a minor than the giving of an acknowledgment. This, however, has nothing to do with the construction of the section. Whether a particular act was or was not for the benefit of the minor is an inference to be drawn from the facts and circumstances of each case. There would be hardly any difference between one isolated payment of interest just before the expiration of limitation and a written acknowledgment given on a similar occasion; and yet both might be for the benefit of the minor. It clearly appears from the judgment of their Lordships

of the Privy Council in the case of *Beti Maharani* v. *The Collector of Etawah* (1) that their Lordships were of opinion that the acknowledgment of the Collector acting on behalf of the Court of Wards would bind a minor whose estate was under the management of the Court.

In such a case it seems to me that the Collector must be regarded as the agent appointed by law to act for the minor or (which is really the same thing), the act of the Collector must be looked upon as the act of the minor. If an Act of the Legislature can confer such a power on the Collector, I can see no reason why the same power is not included in the wide powers vested by virtue of Hindu Law in the guardian of a minor acting for his benefit. It was held in the case of *Narendra Nath Sarkar* v. *Rai Charan Haldar* (2) that a certificated guardian is an agent duly authorized to pay interest on a debt within the meaning of section 20. A distinction was drawn by the learned Judges between the power of a certificated guardian under section 20 and under section 19. That distinction cannot be drawn in the present case, because Musammat Sundar Dei is not a mere certificated guardian with the limited powers of such a guardian. She is a natural Hindu guardian with the extensive powers of such a guardian, and she was in my opinion acting for the benefit of the minors when she gave the acknowledgments.

It has been held in numerous cases that a manager of a joint Hindu family can give a binding acknowledgment even where minors are concerned. It would indeed be a inconvenient state of things if the manager of a joint Hindu family could not make a part payment of principal or a payment of interest so as to bind minor members of the family. It is urged that the position of the manager of a Hindu family is different from the position of a guardian, and he can give an acknowledgment or make a payment because of the joint nature of the family and estate. This cannot be the reason, because section 21 of the Limitation Act provides that nothing in sections 19 and 20 renders one of several joint contractors, partners, etc., chargeable by reason only of a written acknowledgment signed or a payment made by or by the agent of any other or others of them. If the manager of

(1) (1894) I. L. R., 17 All., 198, at p. 208. (2) (1902) I. L. R., 29 Calc., 647.

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a Hindu family can be the "agent," within the meaning of the sections, of a minor member of the family, I can see no reason why the natural guardian may not be the agent also. These cases and the opinion of their Lordships of the Privy Council show that there may be an agent within the meaning of the sections who has not been actually appointed by the person liable. In the Full Bench Case of *Annapagauda Tammangauda* v. *Sangadiyapa* (1) it was held that a guardian appointed under the Guardians and Wards Act could both pay interest, make a part payment or give an acknowledgment. In *Kamla Kuar* v. *Har Sahai* (2) it was held that the Collector in a case under the management of the Court of Wards could give an acknowledgment. Edge, C.J., says:—"He" (the Collector) "was the person who represented the minor defendant and the estate." The natural guardian of a minor Hindu is, in my opinion, entitled by law to act on behalf of the minor in the management of his property, and the act of the guardian, if it is for the benefit of the minor, binds the estate of the latter. In the present case the acknowledgment by Sundar Dei was for the benefit of the minors and they are bound by it either as "their own act" or as the act of the person whom the law authorizes to act in their behalf, that is, of their "agent duly authorized." I think in the circumstances of the present case the acknowledgment of Musammat Sundar Dei binds the estate in the hands of the defendants as an acknowledgment within the meaning of section 19 of the Limitation Act. I would allow the appeal with costs and remand the case.

BY THE COURT.—The opinion of the majority of the Bench being that the case should be remanded under section 562 of the Code of Civil Procedure, we allow the appeal, set aside the decree of the Court below and remand the case under the provisions of that section with directions that it be re-admitted in the file of pending suits and be disposed of according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

(1) (1901) I. L. R., 26 Bom., 221. (2) Weekly Notes, 1883, p. 187.

APPELLATE CIVIL

1908.
June 12.

Before Mr. Justice Banerji and Mr. Justice Richards.

BECHAN SINGH (DEFENDANT) *v.* KARAN SINGH (PLAINTIFF).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 201—Act No. I of 1872 (Indian Evidence Act), section 4—Evidence—Presumption—Record of plaintiff's name as a co-sharer.

Held on a construction of section 201 of the Agra Tenancy Act, 1901, that the words "if in any suit instituted under the provisions of Chapter XI . . . . the plaintiff is recorded as having such proprietary right, the Court shall presume that he has it" mean that, so far as the Revenue Court is concerned, such Court is bound to presume in favour of the plaintiff, and it is for the defendant "to establish by suit in the Civil Court that the plaintiff has no such proprietary right." *Dhanka* v. *Umrao Singh* (1) and *Dil Kunwar* v. *Udai Ram* (2) dissented from. The judgment of Richards, J., in *Dhanka* v. *Umrao Singh* (3) followed. *Banwari Lal* v. *Niadar* (4) explained.

THE plaintiff in this case sued as mortgagee of a 2½ biswa share in mauza Larhapur, pargana Imratpur, to recover from the defendant, the lambardar of the village, his share of profits for the years 1309, 1310 and 1311 Fasli. The plaintiff was recorded in the khewat as mortgagee. The defendant resisted the suit upon various grounds, but mainly upon the ground that the plaintiff was not, and had not been for more than 12 years before suit, in possession of the share in question, and that the defendant was in adverse proprietary possession. The Court of first instance (Assistant Collector of the first class) gave the plaintiff a decree. The defendant appealed. The District Judge dismissed the appeal, holding that, according to section 201 of the Agra Tenancy Act, 1901, the Revenue Court was bound to presume in favour of the plaintiff's title, leaving to the defendant his remedy in the Civil Court. The defendant thereupon appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellant.

Munshi *Gulzari Lal*, for the respondent.

BANERJI, J.—This appeal arises in a suit for profits brought against the lambardar by the mortgagee of a recorded co-sharer. The name of the plaintiff is also recorded in the revenue papers.

*Second appeal No. 1100 of 1905 from a decree of H. W. Lyle, District Judge of Farrukhabad, dated the 1st of August 1905, confirming a decree of Avadh Behari Lal, Assistant Collector of Farrukhabad, dated the 17th of May 1905.

(1) (1907) I. L. R., 30 All., 58.
(2) (1906) I. L. R., 29 All., 148.
(3) Weekly Notes, 1907, p. 43.
(4) (1906) I. L. R., 29 All., 158.

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The claim was resisted on the ground that the plaintiff had no proprietary right and that the defendant was in adverse proprietary possession. The Court of first instance decreed the claim in part and this decree has been affirmed by the lower appellate Court. The learned Judge was of opinion that, having regard to section 201, sub-section (3), of the Agra Tenancy Act, the Court could not go behind the entry in the revenue record and was not competent to try the question of proprietary right raised on behalf of the defendant. The correctness of this decision is impugned in this appeal. Section 201 of the Agra Tenancy Act provides for suits for profits brought by two descriptions of plaintiffs : (1) those whose names are not recorded as having the proprietary right entitling them to bring the suit, and (2) those whose names are so recorded. As regards the first class of persons the section provides that the Court shall proceed in the manner directed in section 199, that is to say, it may either require the plaintiff to institute a suit in the Civil Court to establish his right or it may determine the question of title itself, constituting itself for that purpose a Civil Court, the defeated party having a right of appeal to the District Judge or the High Court as the case may be. In the case of a plaintiff whose name is recorded, the section provides that the Court shall presume that he has such right. But it further provides that in such a case a suit may be brought in the Civil Court to establish that the *plaintiff* has not such proprietary right. It is thus clear from the proviso that if the plaintiff is a person whose name is recorded in the revenue papers it is for the defendant to bring a suit in the Civil Court to have it established that the plaintiff has no such right. It seems to me that the object of the section is that when the name of the plaintiff is recorded in the revenue papers, the Court is bound to presume that he has the right to sue, and the entry of his name should be regarded as sufficient proof and the Court should not go behind it in order to determine the question of the plaintiff's proprietary title, the remedy of the defendant being a civil suit. If the defendant can disprove the plaintiff's title in the Revenue Court and that Court can try the question of title, the proviso is superfluous. Under sections 44 and 57 of the Land Revenue Act (No. III of 1901) an entry in the revenue

registers and in the [illegible] ghts is *primâ facie* evidence of what it records; [illegible] e disputing it has the right to sue in the Civil Court [illegible] establish his right. Those sections would give to the defendant all the remedy that [illegible] might be entitled to, and therefore the whole of clause (3), [illegible] ding the proviso, would be unnecessary and superfluous. Any [illegible] r view would lead to anomalies. If the plaintiff's name is not recorded, the Revenue Court has the option of not trying the question of title and may refer the plaintiff to the Civil Court. But, according to the contention of the appellant, if the name of the plaintiff is recorded, the Revenue Court has no option, but must try the question of title. Again, if the decision of that question by the Revenue Court is adverse to the plaintiff, he has under the proviso no right of suit in the Civil Court. So that the defendant has two remedies open to him, whilst the plaintiff has only one. Surely that could not have been the intention of the Legislature. It is contended that the words 'shall presume' in section 201, sub-section (3), must be read as having the same meaning which is given to those words in the Evidence Act. In my judgment that was not the intention of the Legislature, because we find that in the Tenancy Act and in the cognate Act No. III of 1901 where the Legislature intends any entry to be *primâ facie* evidence of what it records, it uses the words "until the contrary is proved." I may refer to section 108, sub-section (2) of the Tenancy Act and sections 44, 57 and 84 of the Land Revenue Act. It is true that in section 9 of the Tenancy Act, it is provided that certain entries shall be conclusive proof of a person being a permanent tenure-holder or a fixed rate tenant or not as the case may be, but it must be borne in mind that the two Acts were not drawn up with as much care and precision as they should have been. Furthermore, it seems to me that in section 201, sub-section (3), it could not be declared that the record of the plaintiff's name should for all purposes be conclusive proof of the plaintiff's title, because the proviso to that very section enables the defendant to bring a suit in the Civil Court to have the question of title tried and the correctness of the entry tested. Therefore when in sub-section (3) the Legislature provided that if the plaintiff is recorded as having the right, the Court should

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presume that he has it and shou[illegible] the defendant to have the question of title tried in a[illegible] the object of the Legislature was clearly to declare that for the purposes of the suit in the Revenue Court the entry should be regarded as sufficient proof and the Court should not go behind it. That such was the intention would be abundantly manifest if it were permissible to us to refer to the report of the Select Committee on the Bill which afterwards became Act No. II of 1901. Apart, however, from this, the whole context of the section and the policy of the Act lead, in my opinion, to only one conclusion, namely, that the Revenue Court should not go behind the entry. In the case of a person whose name is not recorded, the Act provides that the question of his title should be tried by only one Court, namely, either by the Civil Court or the Revenue Court, which may constitute itself a Civil Court. I fail to see why in the case of a plaintiff whose name is recorded two remedies should have been given to his opponent, namely, a remedy of trial by the Revenue Court and a suit in the Civil Court. In the suit in the Civil Court the decision in the Revenue Court will be nugatory and of no value. Such certainly could not have been the intention of the Legislature. The view I have expressed above was held by my brother Richards and myself in the case of *Niaz Ali Khan* v. *Govind Ram* (F. A. f. O. No. 70 of 1904, decided on the 22nd of May 1905).* The same view was taken by my brother Richards in his dissentient judgment in the case of *Dhanka* v. *Umrao Singh* (1) and recently by Mr. Justice Karamat Husain in *Har Prasad* v. *Syed Muhammad Baqar*

*The judgment in this case was as follows :—

BANERJI and RICHARDS, JJ.—This was a suit for profits by a person who is recorded as having the proprietary right entitling him to claim profits. Under sub-section (3) of section 201 of the Tenancy Act of 1901 the Court shall presume that such a person has a proprietary right. The defendant is competent to sue in a Civil Court under the proviso to that sub-section to establish that the plaintiff has not the proprietary right claimed by him. The Court below was therefore right in remanding the case to the Court of first instance, and we dismiss this appeal with costs.

(1) Weekly Notes., 1907, p. 43.

(S. A. No. 152 of 1907, decided on the 21st of April 1908).* The opposite view was held by Mr. Justice Knox in *Dil Kunwar* v. *Udai Ram* (1) and also in his judgment in *Dhanka* v. *Umrao Singh.* In the same case it was held in appeal under the Letters Patent (2) that the presumption enjoined by section 201 is not conclusive, but may be rebutted by evidence offered to the contrary. With great respect, I am unable to agree with the decisions in the cases in which the contrary has been held. It appears to me that in those cases the considerations to which I have referred above were not given due weight. In the case last mentioned there is no reference to the proviso to section 201, on which the decision of the question entirely depends. We have been referred to the case of *Banwari Lal* v. *Niadar* (3), to

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* The judgment in this case was as follows:—

KARAMAT HUSAIN, J.—This was a suit instituted by Har Prasad and others under section 165 of the Agra Tenancy Act for their share of the profits for 1311 Fasli. The allegation in the plaint was that they were co-sharers in the mahal *gulabi* to the extent of two biswas out of 9 biswas, 10 biswansis, 8 kachwansis and 12 tanwansis. One of the pleas raised in defence by the defendants was that the extent of the share the profits of which were claimed was not correct. The Court of first instance found that the correct amount of the share was 1 biswa, 18 biswansis, 1 kachwansi and 18 tanwansis and gave a decree for the profits of that share. The plaintiffs appealed to the learned District Judge of Moradabad. The first ground of appeal to that Court was that the Court of first instance should have awarded profits in respect of 2 biswas against which the appellant's names were recorded. The learned District Judge affirmed the decree of the first Court, holding that the khewat on the face of it was incorrect. The plaintiffs come here in second appeal, and it is urged on their behalf that the entry in the khewat according to the provisions of section 201, sub-section (3), of Act No. II of 1901 is conclusive. This contention in my judgment is perfectly sound. Sub-section 3, section 201 is as follows:—"If the plaintiff is recorded as having such proprietary right, the Court shall presume that he has it." That being so, the Courts below had no power to go behind the entry in the khewat. I therefore decree the appeal, set aside the decrees of both the Courts below and remand the case under the provisions of section 562 of the Code of Civil Procedure to the Court of first instance through the Court of first appeal with directions to ascertain the amount of the profits on the basis that the plaintiffs are co-sharers of 2 biswas and to award that amount to them. Costs here and hitherto will abide the event.

(1) (1907) I. L. R., 29 All., 148. (2) (1907) I. L. R., 30 All., 58.
(3) (1907) I. L. R., 29 All., 158.

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which I was a party. In that case the District Judge had held that it was for the plaintiffs to show that they or their predecessors in title had within 12 years collected the profits. From this view we dissented, and we pointed out the provisions of section 201. No doubt in the judgment the following words occur:— "it was for the defendant to rebut the presumption the law raised in the plaintiff's favour." As regards this, I may observe that the question whether the presumption under section 201 was a rebuttable presumption or not was not discussed and this observation was only an *obiter dictum*. However, on full consideration I think it was erroneous. In my judgment the conclusion at which the Court below arrived is right. I would accordingly dismiss the appeal with costs.

RICHARDS, J.—The learned District Judge dismissed the appeal in the Court below on the ground that on the true construction of section 201, sub-section (3), of the Agra Tenancy Act, the plaintiff being recorded as having proprietary title was entitled to a decree. I entirely agree with the decision and reasons given by the learned District Judge. A difficulty, however, arises by reason of the fact that a contrary view was taken by a Bench of this Court in the case of *Dhanka* v. *Umrao Singh* (1). My learned colleague has referred to the various cases in which the construction of section 201 of the Act has been considered, and it seems to me that we are entitled, having regard to the conflict of authority, to consider the provisions of the section without feeling bound by any previous decisions. The case of *Dhanka* v. *Umrao Singh* was heard in the first instance by Knox, J. and myself. In the course of my judgment I gave at some length my reasons for holding that under the provisions of sub-section (3) of section 201 a Revenue Court could not go behind the entry in the khewat recording the plaintiff's proprietary title. The judgment is reported in the Weekly Notes, 1907, p. 43. I endeavoured to point out that if the Legislature intended that the entry should merely raise a *primâ facie* case in favour of the plaintiff, the whole sub-section was quite meaningless and superfluous. Sections 44 and 57 of the Revenue Act had already made entries of this nature *primâ facie* evidence, and it was

(1) (1907) I. L. R., 30 All., 58.

therefore entirely unnecessary to re-enact in section 201 of the Tenancy Act what was already abundantly provided for by a general section of the Revenue Act. I also pointed out how inconvenient such a construction would be having regard to the proviso to sub-section (3). I would, however, here like to correct an error in my judgment in the case. At p. 44 of the Report the following passage occurs:—'To hold otherwise necessarily involves the almost absurd result that the Revenue Court can decide the question of title against the plaintiff, and that notwithstanding such decision the same plaintiff can at once go to the Civil Court to try the same question over again." The word 'defendant' should be substituted for the word 'plaintiff' because it is quite clear that it is only the defendant who is entitled to go to the Civil Court and ask for a declaration that the plaintiff has no title. It seems to me that the very fact that it is the defendant and not the plaintiff who is entitled under the proviso to go to the Civil Court is the strongest possible argument in favour of the construction given to the section by the learned District Judge. As pointed out by my learned colleague in the course of the judgment he has just delivered, if the construction contended for by the appellant is to be given to the sub-section, the defendant is entitled to a complete trial of the question of title in the Revenue Court, and if the decision be against him he can have the same question retried in the Civil Court. Why is a plaintiff whose title is recorded not given the same right of going to the Civil Court? The answer is, I think, because, his title being recorded, the Revenue Court cannot decide the question of title against him and he has therefore no necessity to go to the Civil Court. I have not at all lost sight of the fact that the view that I take did not find favour with the Bench before whom the case of *Dhanka* v. *Umrao Singh* came in a Letters Patent Appeal. I have therefore reconsidered my judgment, and I have also very carefully considered the judgment of the Court hearing the appeal. It seems to me that the proviso to sub-section (3) altogether escaped the notice of the Court. None of the reasons I gave for arriving at the conclusion at which I did arrive are dealt with in the judgment of the Court. The learned Judges ask:—" Is there any

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grave reason for interpreting the words 'shall presume' as equivalent to the words 'shall conclusively presume'?" I think that there are grave reasons for holding that a Revenue Court, in suits instituted under the provisions of Chapter XI of the Act, should not go behind the record of the proprietary title of the plaintiff. The clear intention of the section itself is one reason which would be defeated by any other construction. The section provides the course the Court is to adopt—(1) in the case of a plaintiff who is not recorded, and (2) in the case of a plaintiff who is recorded. Sub-section (3) is without object or meaning if the Revenue Court is to go behind the entry, and renders two conflicting decisions possible. The learned Judges say:—"The question is by no means free from difficulty" and towards the end of the judgment "*on the whole* we see no reason for giving conclusiveness to a presumption where the Legislature has not in express terms done so." It seems to me that the learned Judges formed no very strong opinion contrary to the opinion that we took in the case of *Niaz Ali Khan* v. *Gobind Ram*, and which we still hold after further consideration. The decision seems to me to be based upon the definition of the words 'shall presume' in the Evidence Act. There is no similar definition in the Agra Tenancy Act. The whole object of section 201 of the latter Act and the proviso to sub-section (3) clearly show, I think, that the meaning given by express definition in the Evidence Act to the expression 'shall presume' cannot be given to the same words in section 201, sub-section (3), of the Tenancy Act. A perusal of the provisions of the Revenue Act clearly shows that it was the intention of the Legislature to make the records in the revenue registers and record of rights as accurate and as valuable as possible. Elaborate provisions are made for their preparation and correction, and it certainly is not unnatural to suppose that the Legislature intended by sub-section (3) that in a Revenue Court these records should be deemed conclusive in certain specified suits, namely, in suits instituted under the provisions of Chapter XI of the Act. The value and efficacy of these records will be much enhanced if pressure is brought to bear on persons entitled to proprietary rights to have such rights recorded. In section 108, sub-section (2), a receipt is made *primâ facie* evidence of an acquittance in full

up to the date of the receipt. The words used are "it shall be presumed until the contrary is shown." Here we have an instance in which the same words in the same Act are qualified by the words "until the contrary is shown." Section 44 of the Land Revenue Act (passed the same day as the Tenancy Act) provides that the entries in the Annual Registers "shall be presumed to be true until the contrary is proved." Section 57 provides that all entries in Records of Rights "shall be presumed to be true until the contrary is shown." It cannot be said that where the Legislature intended the words 'shall presume' to create merely a *primâ facie* presumption it never said so. It is true that the expression 'conclusive proof' occurs in section 9. This section, however, refers to all Courts and not merely to a Revenue Court.

The point involved is one of great importance and of frequent occurrence. After full consideration I have no doubt but that the decision of the Court below was correct, and I also would dismiss the appeal with costs.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1902 *April 5.*

CHEDA LAL AND ANOTHER (DEFENDANTS) *v.* GOBIND RAM (PLAINTIFF).*

Will—Construction of document—"Money"—General personal estate.

Where a testator after clearly indicating an intention to exclude entirely certain of his relations from succession to his property, proceeded to bequeathe his "money" to two legatees, with directions as to its disposal, it was *held* that the intention of the testator being apparently, from a perusal of the whole will, to bequeathe all his personal property to the legatees, it was not necessary to construe the term used in its strict limited signification, but the whole of the testator's personal estate passed. *Cadogan* v. *Palagi* (1) referred to.

THE suit out of which this appeal arose was instituted by Gobind Ram, the surviving brother of one Bhawani Das, who died on the 7th September 1898, to recover from the defendants Cheda Lal and Joti Prasad certain movable property which belonged to Bhawani Das at his death. The defendants claimed to be entitled to possession of the property in question under the

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* First Appeal No. 110 of 1899 from a decree of Maula Bakhsh, Officiating Subordinate Judge of Bareilly, dated the 6th of April 1899.

(1) (1883) L. R., 25 Ch. D., 154.

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provisions of a will alleged to have been executed by the deceased on the 9th of March 1888. The plaintiff in his plaint alleged that this will was a fabricated will, and he claimed the property as the surviving member of a joint Hindu family consisting of Bhawani and himself. The Court of first instance (Subordinate Judge of Bareilly) found that the alleged will was a genuine will, but he held that upon the construction of it the property in dispute did not pass to the defendants, but was undisposed of. He also found that the plaintiff Gobind Ram and Bhawani were not members of a joint family, but were separate. The defendants appealed, urging that, on a proper construction of the will of Bhawani Das, not only money strictly so called passed to them, but all the personal estate of the testator. The terms of the will in dispute, so far as they are material, are set forth in the judgment.

Mr. *R. Malcomson*, for the appellants.

The Hon'ble Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This suit was instituted by Gobind Ram, the surviving brother of one Bhawani Das, who died on the 7th September 1898, to recover from the defendants Cheda Lal and Joti Prasad certain movable property which belonged to Bhawani Das at his death. The defendants claim to be entitled to possession of the property in question under the provisions of a will alleged to have been executed by the deceased on the 9th of March 1888. The plaintiff in his plaint alleged that this will was a fabricated will, and he claimed the property as the surviving member of a joint Hindu family consisting of Bhawani and himself. The learned Subordinate Judge found that the alleged will was a genuine will, but he held that upon the construction of it the property in dispute did not pass to the defendants, but was undisposed of. He also found that the plaintiff Gob nd Ram and Bhawani were not members of a joint family, but were separate. The will contains the following provisions. After a recital that his nephews, Ram Chandar and Dina Nath the sons of Gobind Ram, were separate from him; that they had always been troubling him, and that there was an ill-feeling between them and him, and a recital that according to Hindu Law these nephews would inherit his estate after his death,

the testator thereby excluded them from inheriting his estate and "did not wish to give them a single shell from his property." The will then provides that the defendants, the testator's nephew (sister's son) Cheda Lal, and Joti Prasad, son of Ganesh Prasad, Brahman, who were fond of him and with whom he was pleased, should after his death have all his funeral ceremonies performed with "my money and also with money due to me under bonds which may be realized, and after my funeral ceremonies they should also have my *barsi* and *chaubarsi* performed." Then follows a direction that "if any money is left after the performance of the above-mentioned ceremonies it must be laid out on some religious purpose or in building a *thakurdwara* (temple) by which the testator's soul may be benefited and which was proper according to Hindu law." Then there is the following direction:—"But my nephews aforesaid (brother's sons) neither have nor shall have any right whatever in my before-mentioned property," which reiterates the determination of the testator to exclude these nephews from participating in his estate. Possession of all the movable property of the deceased was made over by the Collector to the defendants as the parties entitled to it under the will which was found amongst the testator's papers. The plaintiff, though he alleged that the will was a fabricated document in the Court below, before us on appeal does not dispute its validity, but he alleges that under the terms of the will only money in the restricted signification of the word passed to the defendants, and he claims the rest of the deceased's property consisting of articles of silver and gold, brass and other metals, wearing apparel, etc., as his heir. The testator appears to have considered that the plaintiff's sons would inherit his property under Hindu law. He may have thought that his brother would predecease him. On the part of the defendants the contention is that the will was a disposition of the entire property of the deceased and that they are universal legatees of it upon the trusts mentioned in the document. There is no doubt that in the absence of explanatory context a word such as "money" should be construed in its strict sense; but terms which in their strict and proper signification apply to a particular species of property, as in this case *rupia*, have been held to embrace the general personal estate of a testator.

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The word money, the equivalent of *rupia* (rupees), is often used in a vague sense as denoting a man's personal or movable property, and it has been so interpreted in several cases. This has been done in cases where a testator has shown a clear intention to make a complete disposition of his property, an intention which could only be carried out by giving a wide interpretation to the word money. We have been referred to an authority which illustrates this, namely, the case of *Cadogan* v. *Palagi* (1). In that case the testatrix, who was possessed of cash securities, leaseholds, furniture and effects, by her will, gave one-half of the money of which she was possessed to her sister Honoria Frances Cadogan, and directed that the remainder should be divided equally between certain other sisters and after them their children. It was held that in construing a will no absolute technical meaning should be given to such a word as money, the meaning of which must depend upon the context, if any, which can explain it, and upon such surrounding circumstances as the Court can take into consideration in determining the construction. It was held in that case that the word *money* passed all the personal estate. Now if anything is clear upon the will before us it is that the testator did not intend to die intestate as to any portion of his property. It is to be observed that the Court always leans against so construing a will as to make a testator die partially intestate. This is what we are asked to do in this case. In the opening words of the will the testator declares that he "excludes his nephews (brother's sons) from inheriting his estate." The word which is translated estate is the word *turka, i.e.,* what is left behind, and that he does not wish to give them a single shell from his "property," the word used for property being *jaidad.* Then follows the direction in favour of the two defendants, and in this, the operative part of the will, he directs that they shall perform his funeral ceremonies with his (the testator's) money, and also with the money due to him under bonds, etc. At the end of the will details of the bonds and decrees outstanding in his favour are given. Now it appears to us that when he used the words "my money" coupled with the words "also money due to me" he meant by the words "my money" something outside and other

(1) (1883) L. R., 25 Ch. D., 154.

than the money due to him upon the bonds and decrees stated in the details contained in the will. What was that money? Undoubtedly, as we have said, he did not intend to die partially intestate, and it appears to us that when he used the words "my money" he intended that that word *rupia* (money) should be synonymous with the words *turka* and *jaidad* which he used in the earlier part of the will, and so dispose of by his will whatever he should leave behind him. In the last direction in the will that his nephews should have no right whatever in his property before mentioned, the testator emphasizes his determination to make a complete disposition. We cannot disregard the very clear intention of the testator to dispose of all his property which appears upon the face of this document. For these reasons we think that the learned Subordinate Judge was entirely in error in the construction which he placed upon the will, and that the defendants are entitled to hold all the testator's property upon the trusts and for the purposes declared by the will. We are not asked to state whether the dispositions of the will in favour of religious purposes or for the building of a *thakurdwara* are valid or not. This is a matter which may have to be determined, but with which we have nothing to do in the present appeal; all that we say is that, having regard to the provisions of the will, the plaintiff is not entitled to dispossess the defendants of the testator's property. We therefore allow the appeal, set aside the decree of the Subordinate Judge and dismiss the plaintiff's suit. As to costs, if the plaintiff had instituted his suit for the purposes of determining the true construction of the will, we should have been disposed to allow him his costs in both Courts out of the estate, because no doubt upon the terms of this will there is a fair question for argument, but inasmuch as he impeached the will in the Court below and alleged that it was a fabricated document, we cannot see our way to allow him costs in the Court below, but we shall allow him his costs of this appeal to be paid out of the estate. The defendants will be entitled to the costs of defending the suit in the Court below and also of this appeal out of the estate.

Appeal decreed.

1908.
May 14.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAM RATAN (DEFENDANT) *v.* LACHMAN DAS, (PLAINTIFF).*

Hindu law—Joint Hindu family—Liability of other members of family for managing member's debts.

R. R., a member with *G. L.*, his uncle, of a joint Hindu family, got a decree for costs against *G. L.*, and had him arrested in execution thereof. *G. L.*, thereupon borrowed money on a mortgage of joint family property and procured his release. *Held* on suit by the mortgagee for sale of the mortgaged property that the mortgagee could not under the circumstances proceed against *R. R.'s* interest in the joint family property. *Dalip Singh* v. *Sri Kishen Pande* (1) distinguished.

THIS was a suit on a mortgage bond of the 31st of August 1902, executed by one Gendan Lal, who is said to have been the manager of a joint Hindu family, of which Ram Ratan, his nephew, and several others were members. Ram Ratan brought a suit against his uncle, Gendan Lal, and obtained a decree, and in order to provide money for the satisfaction of this decree, in connection with which Gendan Lal was imprisoned, Gendan Lal, purporting to act as manager of the joint family, executed the mortgage in suit. The Court of first instance (Munsif of Moradabad) decreed the plaintiff's claim, and this decree was affirmed by the Additional Judge. Ram Ratan appealed to the High Court, on the ground that he, though a member of the joint family at the time when the bond was executed, was in no way liable to pay Gendan Lal's debt, which was owing to himself, and that his share in the joint family property is not liable to be sold in execution of a decree on the mortgage executed by Gendan Lal.

Munshi *Gokul Prasad* and Dr. *Tej Bahadur Sapru*, for the appellant.

Babu *Durga Charan Banerji*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This was a suit on a mortgage bond of the 31st August 1902, executed by one Gendan Lal, who is said to have been the manager of a joint Hindu family, of which Ram Ratan, his nephew, and several others were members. It appears that Ram Ratan brought a suit against his uncle,

*Second Appeal No. 710 of 1907 from a decree of W. F. Kirton, Additional District Judge of Moradabad, dated the 9th of March 1907, confirming a decree of Abdul Ali, Munsif of Moradabad, dated the 11th of December 1906.

(1) N.-W. P., H. C. Rep., 1872, p. 83.

than the money due to him upon the bonds and decrees stated in the details contained in the will. What was that money? Undoubtedly, as we have said, he did not intend to die partially intestate, and it appears to us that when he used the words "my money" he intended that that word *rupia* (money) should be synonymous with the words *turka* and *jaidad* which he used in the earlier part of the will, and so dispose of by his will whatever he should leave behind him. In the last direction in the will that his nephews should have no right whatever in his property before mentioned, the testator emphasizes his determination to make a complete disposition. We cannot disregard the very clear intention of the testator to dispose of all his property which appears upon the face of this document. For these reasons we think that the learned Subordinate Judge was entirely in error in the construction which he placed upon the will, and that the defendants are entitled to hold all the testator's property upon the trusts and for the purposes declared by the will. We are not asked to state whether the dispositions of the will in favour of religious purposes or for the building of a *thakurdwara* are valid or not. This is a matter which may have to be determined, but with which we have nothing to do in the present appeal; all that we say is that, having regard to the provisions of the will, the plaintiff is not entitled to dispossess the defendants of the testator's property. We therefore allow the appeal, set aside the decree of the Subordinate Judge and dismiss the plaintiff's suit. As to costs, if the plaintiff had instituted his suit for the purposes of determining the true construction of the will, we should have been disposed to allow him his costs in both Courts out of the estate, because no doubt upon the terms of this will there is a fair question for argument, but inasmuch as he impeached the will in the Court below and alleged that it was a fabricated document, we cannot see our way to allow him costs in the Court below, but we shall allow him his costs of this appeal to be paid out of the estate. The defendants will be entitled to the costs of defending the suit in the Court below and also of this appeal out of the estate.

Appeal decreed.

Gendan Lal, and obtained a decree, and in order to provide money for the satisfaction of this decree, in connection with which Gendan Lal was imprisoned, Gendan Lal, purporting to act as manager of the joint family, executed the mortgage in suit. The Court of first instance decreed the plaintiff's claim, and this decree was affirmed by the lower appellate Court. Ram Ratan now appeals to this Court, and his case is that he, though a member of the joint family at the time when the bond was executed, was in no way liable to pay Gendan Lal's debt, which was owing to himself, and that his share in the joint family property is not liable to be sold in execution of a decree on the mortgage. The learned Additional Judge in his judgment was of opinion that the raising of the loan by Gendan Lal was a matter of necessity, and that, in view of the decision in *Dalip Singh* v. *Sri Kishen Pande* (1) the plaintiff was entitled to maintain his decree. That case decided that ancestral property may be sold by a father to effect his release from prison. Now there is no doubt that Hindu sons are liable for their father's debts, and that the sons in such a case are bound to satisfy the debts, and, if necessary, by payment of the father's debts, release him from custody. But this is an entirely different case. The appellant Ram Ratan was under no liability to pay Gendan Lal's debt—a debt which, as we have said, was due to himself. Therefore there is no analogy between this case and the case on which the learned Additional Judge rested his decision. We think that his decision is wrong and that the appeal must be allowed so far as Ram Ratan is concerned. The other defendants to the suit have not resisted the decree, and therefore it will hold good as to them. As regards Ram Ratan the suit must be dismissed as against him. We accordingly allow the appeal. We set aside the decree passed against Ram Ratan, and dismiss it as against him and as against his share of the mortgaged property, with costs in all Courts.

Appeal decreed.

(1) N.-W. P., H. C. Rep., 1870, p. 83.

1908
May 15.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

UMMI BEGAM (PLAINTIFF) *v.* KESHO DAS (DEFENDANT). *

Lunatic Muhammadan law—Guardian de facto—Sale of lunatic's property by mother and wife for benefit of lunatic.

The mother and wife of a lunatic Muhammadan, acting *de facto* as the guardians of the lunatic, sold certain property belonging to the lunatic in order to discharge debts due by him. *Held* that the transaction could not be impeached, although the mother was not under the Muhammadan law the legal guardian of the lunatic. *Mafazzal Hosain* v. *Basid Sheikh* (1), *Ram Charan Sanyal* v. *Anukul Chandra Acharjya* (2) and *Majidan* v. *Ram Narain* (3) followed.

THE plaintiff in this case sued as daughter and heiress of one Mahmud Husain, who was a lunatic, to recover possession of her share in a certain plot of land. The land in suit had been sold on the 22nd of June 1867 by the wife and mother of the lunatic acting as guardians on his behalf, and the purchaser on the 19th of May 1877, sold it to the father of the defendant in the present suit. The second purchaser built a house on the land, said to have been of considerable value. The lower appellate Court (Additional District Judge of Moradabad) found that the sale had been effected by the wife and mother of the lunatic as his *de facto* guardians, and that the sale was for his benefit, debts due by him having been paid off out of the proceeds thereof. That Court accordingly dismissed the suit. The plaintiff appealed to the High Court.

Mr. *Muhammad Ishaq Khan* and Babu *Jogindro Nath Mukerji*, for the appellant.

Mr. *M. L. Agarwala* and Dr. *Satish Chandra Banerji*, for the respondent.

STANLEY, C.J., and BANERJI, J.—The appellant is the daughter of one Mahmud Husain, who was a lunatic. She brought the suit out of which this appeal has arisen for possession of her share of the site of a house now in the possession of the defendant. Mahmud Husain, as we have said above, was a lunatic. On the 22nd of June 1867 his wife and mother executed a sale deed in respect of the land now in suit. The purchaser under

* Second Appeal No. 790 of 1907, from a decree of A. Kendall, Additional District Judge of Meerut, dated the 6th of April 1907, reversing a decree of H. David, Subordinate Judge of Meerut, dated the 4th of December 1906.

(1) (1906) I. L. R., 34 Calc., 36. (2) (1906) I. L. R., 34 Calc., 65.
(3) (1903) I. L. R., 26 All., 22.

that sale sold his rights to the defendant's father on the 19th of May 1877. After his purchase a house was built by the purchaser on the land, and it is alleged that the house is of considerable value. The present suit was brought by the plaintiff on the last day of the expiry of limitation calculated from the date of the lunatic's death. The Court below has found that the sale was effected by the mother and wife of the lunatic as his *de facto* guardians, and that the sale was for the benefit of the lunatic, debts due by him having been discharged with the proceeds of the sale. It is contended that the mother and the wife were not the legal guardians of the lunatic under the Muhammadan law, and it is urged that they had no power to sell the lunatic's property. It is true that under the Muhammadan law a mother is not the legal guardian of the property of her minor son, but it has been held that when she, acting as *de facto* guardian, deals with the property, the transaction, if it is for the benefit of the minor, ought to stand. We may refer to the rulings of the Calcutta High Court in *Mafazzal Hosain* v. *Basid Sheikh* (1) and *Ram Charan Sanyal* v. *Anukul Chandra Acharjya* (2) and to the ruling of this Court in *Majidan* v. *Ram Narain* (3). In our judgment the decision of the Court below is right. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1906) I. L. R., 34 Calc., 36. (2) (1906) I. L. R., 34 Calc., 65.
(3) (1903) I. L. R., 26 All., 22.

1908
May 16

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GENDO (DEFENDANT) *v.* NIHAL KUNWAR (PLAINTIFF).

Civil Procedure Code, sections 244, 258—*Execution of decree—Uncertified payment out of court—Subsequent execution by decree-holder—Suit to recover sum paid out of court.*

A judgment-debtor made a part payment of what was due under the decree against him to the decree-holder, but such payment was not certified in the manner required by section 258 of the Code of Civil Procedure, and the decree-holder in consequence was able to take out execution and get the amount paid twice over. *Held* that a suit by the judgment-debtor to recover the amount paid out of Court to the decree-holder was not barred either by section 244 or by section 258 of the Code. *Shadi* v. *Ganga Sahai* (1) and *Periatambi Udayan* v. *Vellaya Goundan* (2) followed.

THE facts of this case are as follows:—

On the 18th of February 1902, Ram Prasad and Tulshi Ram the ancestors of the defendant, brought a suit against the plaintiff for recovery of a sum of Rs. 2,020 due on a mortgage by sale of the mortgaged property. The suit was compromised on the 19th of March 1902, the provisions of the compromise being that on payment of the sum of Rs. 1,750 by the mortgagor without interest, within a year, the suit should not be pressed, but in default of payment of that amount the mortgagees were to be at liberty to obtain an order absolute under section 89 of the Transfer of Property Act. The plaintiff in the present, suit deposited a sum of Rs. 1,750 on the 20th of March 1903, which was a day late, and this sum was paid to Ram Prasad and Tulshi Ram. On the 1st of April 1903, Ram Prasad and Tulshi Ram filed an application for an order absolute under section 89 for Rs. 2,875. Again a settlement was come to out of Court on the 4th of May 1903, the plaintiff paying a sum of Rs. 634-7-0 in cash in settlement of the claim and obtaining a receipt therefor. Notwithstanding the receipt of this amount, which represented the balance of the debt, the decree-holders, on the 19th May 1903, obtained an order absolute under section 89. Ram Prasad and Tulshi Ram are dead, and the defendant is their heir. On the 26th of February 1906, the defendant took out execution of the decree, and the plaintiff thereupon filed objections,

* Second Appeal No. 383 of 1907, from a decree of A. Kendall, Additional District Judge of Meerut, dated the 8th of March 1907, reversing a decree of Banke Behari Lal, Munsif of Meerut, dated the 31st of May 1906.

(1) (1881) I. L. R. 3 All., 538. (2) (1897) I. L. R., 21 Mad., 409.

alleging that she had paid the anount due, and stating that she held a receipt for it. This objection was overruled on the ground that the payment had not been certified under section 258 of the Code of Civil Procedure, and on the ground that her application was beyond time. Thereupon the present suit was instituted for the recovery of the sum of Rs. 634-7, paid as above described. The suit was dismissed by the Court of first instance (Munsif of Meerut), but this decision was reversed, and the suit decreed by the Additional District Judge. The defendant appealed to the High Court.

Dr. *Satish Chandra Banerji* and Babu *Lalit Mohan Banerji*, for the appellant.

Mr. *M. L. Agarwala* and Lala *Girdhari Lal Agarwala*, for the respondent.

STANLEY, C. J., and BANERJI.—This was a suit for the recovery of a sum of Rs. 634-7-0 and interest, which is alleged to have been paid by the plaintiff to the ancestors of the defendant in satisfaction of the balance due on a decree held by them, and which was not so applied. The facts leading up to it are these. On the 18th of February 1902, Ram Prasad and Tulshi Ram, the ancestors of the defendant, brought a suit against the plaintiff for recovery of a sum of Rs. 2,020 due on a mortgage by sale of the mortgaged property. The suit was compromised on the 19th of March 1902, the provisions of the compromise being that on payment of the sum of Rs. 1,750 by the mortgagor without interest, within a year, the suit should not be pressed, but in default of payment of that amount the mortgagees were to be at liberty to obtain an order absolute under section 89 of the Transfer of Property Act. The plaintiff in the present suit deposited a sum of Rs. 1,750 on the 20th of March 1903, which was a day late, and this sum was paid to Ram Prasad and Tulshi Ram. On the 1st of April 1903, Ram Prasad and Tulshi Ram filed an application for an order absolute under section 89 for Rs 2,375. Again a settlement was come to out of Court on the 4th of May 1903, the plaintiff paying a sum of Rs. 634-7-0 in cash in settlement of the claim and obtaining a receipt therefor. Notwithstanding the receipt of this amount, which represented the balance of the debt, the decree-holders on the 19th May 1903 obtained

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an order absolute under section 89. Ram Prasad and Tulshi Ram are dead, and the defendant is their heir. On the 26th of February 1906, the defendant took out execution of the decree, and the plaintiff thereupon filed objections, alleging that she had paid the amount due, and stating that she held a receipt for it. This objection was overruled on the ground that the payment had not been certified under section 258 of the Code of Civil Procedure, and on the ground that her application was beyond time. Thereupon the present suit was instituted. It is stated, and it is not denied, that the property of the plaintiff has been sold in execution of the decree and the entire amount payable to the defendant has been realized by the sale. The question then is whether or not the plaintiff has any remedy in respect of the sum of Rs. 634-7-0, which was paid to Ram Prasad and Tulshi Ram for the purpose of satisfying the balance due at the time, or must submit to the payment of this amount twice over. We think that the lower appellate Court rightly decided that neither section 244 nor section 258 of the Code precludes the institution of a suit such as this, and we are supported in this view by several authorities. One is a case in this Court—*Shadi* v. *Ganga Sahai* (1), which is on all fours with the case before us. Another is the case of *Periatambi Udayan* v. *Vellaya Goundan* (2). The same point was decided similarly in this case. We agree with those decisions and dismiss this appeal with costs.

Appeal dismissed.

(1) (1881) I. L. R., 3 All., 258. (2) (1897) I. L. R., 21 Mad., 409.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908
May 21.

GHASITEY (DEFENDANT) *v.* GOBIND DAS (PLAINTIFF) AND BAIJ NATH AND ANOTHER (DEFENDANTS).*

Pre-emption—Re-sale to a co-sharer after institution of a suit for pre-emption—Act No. IV of 1882 *(Transfer of Property Act), section* 52—*Lis pendens.*

After the filing of a suit for pre-emption but before service of summons on the defendants, the defendant vendee re-sold the property claimed to a second vendee who had equal rights as a co-sharer with the plaintiff. This second vendee was added by the Court as a party defendant, but the plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. *Held* that the doctrine of *lis pendens* applied, and the plaintiff was entitled to a decree. *Faiyaz Husain Khan* v. *Prag Narain* (1) referred to. *Manpal* v. *Sahib Ram*(2) distinguished.

THE facts out of which this appeal arose are as follows :—

ONE Janki Das sold his share in certain property on the 10th of July 1905 to Baijnath, who is a stranger. On the 1st of June 1906, the present suit was instituted by Gobind Das, the plaintiff, to enforce his right of pre-emption in respect of this sale. On the 11th of June 1906, before the summons in the suit was served on Baijnath, the latter sold the property to Ghasitey, who is a co-sharer of equal degree with the plaintiff in the village. Ghasitey was added as a defendant by the order of the Court and not on the application of the plaintiff. The plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. It was not disputed that the plaintiff had no right of pre-emption superior to that of Ghasitey, but the contention put forward on behalf of the plaintiff which found favour with the Court below was that, having regard to the provisions of section 52 of the Transfer of Property Act, the purchase by Ghasitey after the institution of the plaintiff's suit could not defeat the plaintiff's right of pre-emption.

The claim was decreed by the Court of first instance (Munsif of Banda) and the decree of that Court was affirmed by the lower appellate Court (District Judge of Banda.) The defendant Ghasitey appealed to the High Court.

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* Second Appeal No. 224 of 1907, from a decree of L. Marshall, District Judge of Banda, dated the 21st of December 1906, confirming a decree of Syed Hamid Husain, Munsif of Banda, dated the 8th of November 1906.

(1) (1907) I. L. R., 29 All., 339. (2) (1905) I. L. R., 27 All., 544.

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GHASITEY
v.
GOBIND
DAS.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the appellant.

Mr. *Muhammad Raoof*, for the respondent Gobind Das.

STANLEY, C. J., and BANERJI, J.—This appeal arises in a suit for pre-emption brought under the following circumstances. One Janki Das sold his share in certain property on the 10th of July 1905 to Baijnath, who is a stranger. On the 1st of June 1906, the present suit was instituted by Gobind Das, the plaintiff, to enforce his right of pre-emption in respect of this sale. On the 11th of June 1906, before the summons in the suit was served on Baijnath, the latter sold the property to Ghasitey, who is a co sharer of equal degree with the plaintiff in the village. It is not disputed that the plaintiff has no right of pre-emption superior to that of Ghasitey, but the contention put forward on behalf of the plaintiff, which found favour with the Court below, was that, having regard to the provisions of section 52 of the Transfer of Property Act, the purchase by Ghasitey after the institution of the plaintiff's suit could not defeat the plaintiff's right of pre-emption. Ghasitey, we may mention, was added as a defendant by the order of the Court and not on the application of the plaintiff. The plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. The claim was decreed by the Court of first instance and the decree of that Court was affirmed by the lower appellate Court.

It is urged before us that the rule of *lis pendens* cannot apply to the present case, and that as the right of Ghasitey was not inferior to that of the plaintiff, the suit ought to have been dismissed. In our judgment this contention is not well founded. It has been held by the Privy Council in the recent case of *Faiyaz Husain Khan* v. *Prag Narain* (1) that where a suit is contentious in its origin and nature it is not necessary that the summons should have been served in the suit in order to make it a contentious one within the meaning of section 52 of the Transfer of Property Act and render the doctrine of *lis pendens* applicable. The fact therefore of the purchase by Ghasitey having been made before the service of summons does not make section 52 of the Transfer of Property Act inapplicable. That

(1) (1907) I. L. R., 29 All., 339.

section provides that during the active prosecution of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which might be made therein. Had the sale in favour of Ghasitey not been affected, the plaintiff would have got a decree for pre-emption as against the original vendee, Baijnath. As the purchase by Ghasitey was made after the institution of the plaintiff's suit, this purchase cannot, having regard to the provisions of section 52, affect the right of the plaintiff under the decree obtained in the suit. Had the sale been made before the institution of the suit, the result would have been different, because at the date of the institution of the suit the plaintiff would have had no right preferential to that of the purchaser then holding the property. When however after the institution of the suit for pre-emption a sale is made that sale cannot affect the right of the plaintiff to the decree obtained in the suit, as the purchaser took the property subject to the result of the suit. The case of *Manpal* v. *Sahib Ram* (1), referred to by the learned vakil for the appellant, is distinguishable. There the plaintiff amended his plaint, made the second purchaser of the property a defendant to the suit, and raised the issue of his title to pre-empt as against that purchaser. It was held that after having gone to trial upon that issue, he could not take shelter under the provisions of section 52. That is not the case here. In the present suit the sale was made, as we have said above, some days after the institution of the suit. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

(1) (1905) I. L. R., 27 All., 544.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

1908
May 25.

DWARKA DAS AND ANOTHER (PLAINTIFFS). *v.* AKHAY SINGH (DEFENDANT) *

Civil Procedure Code, section 13—*Res judicata—Question of right to receive a recurring payment—Civil and Revenue Courts—Revenue Court deciding a question of title.*

The plaintiffs sued to recover their share of an annuity chargeable on a 7½ biswa share of a certain village for the years 1309, 1310 and 1311 Fasli. In a previous suit between the same parties in respect of the years 1306, 1307 and 1308, the plaintiff's right to receive the annuity had been admitted by the defendant, and a decree passed accordingly which had been affirmed by the High Court.

Held that the fact that the two suits related to different years did not prevent the judgment in the former operating as *res judicata* in the latter. *Chandi Prasad* v. *Maharaja Mahendra Mahendra Singh* (1) followed. Neither did the fact that the first decision was that of a Court of Revenue make any difference. Either the suit was wrongly brought in a Revenue Court, a defect which was cured by its coming to a Civil Court in appeal; or the Revenue Court deciding a question of title might be regarded *quoad hoc* as a Civil Court. *Salig Dube* v. *Deoki Dube* (2) referred to.

THE facts of this case as found by the lower appellate Court are as follows:—In 1862 there was some litigation between one William Derridon and his two sisters Rosina and Teresa. Under a compromise decree, dated the 11th of September 1862, the two sisters were given an annuity of Rs. 360, and it was made a charge on 7½ biswas muafi rights in mauza Anwalkhera. The compromise decree provided that the two ladies were to enjoy the annuity for their lives; that after their death it was to devolve on their issue; that the ladies and their heirs had no right to transfer the annuity charge; that the annuity charge was to revert to Major Derridon (father of William) and his heirs on the death of the two ladies without issue. The ladies died without issue and the annuity charged reverted to George Derridon (a nephew of William) and he became the absolute owner of the charge. The father of the plaintiffs purchased half the share in the charge from George Derridon, and he acquired the right to realize the charge from 7½ biswas muafi. William Derridon had transferred 1 biswa and 16 biswansis out of the

* Second Appeal No. 88 of 1907, from a decree of Sheo Prasad, Additional Subordinate Judge of Agra, dated the 23rd of October 1906, confirming a decree of Baidya Nath Das, Munsif of Agra, dated the 21st of December 1905.

(1) (1901) I. L. R., 24 All., 112. (2) Weekly Notes, 1907, p. 1.

7½ biswas to the father of the plaintiffs and the remaining 5 biswas and 14 biswansis muafi were purchased at auction sale by the defendants 2nd set. The plaintiffs' father thus became the owner of the charge on 7½ biswas muafi and of 1 biswa and 16 biswansis muafi itself. The proportionate charge on 1 biswa and 16 biswansis muafi became merged in it and he transferred the said full and absolute muafi to the defendants 1st set.

In 1897, the plaintiffs brought a suit for recovery of their share of the charge for certain years against the defendant Raja Akhay Singh. The suit was decreed on the admission of the defendant. The present suit was for the recovery of instalments of the same charge for other years. The Court of first instance (Munsif of Agra) dismissed the suit and this decision was on appeal confirmed by the Additional Subordinate Judge. The plaintiffs appealed to the High Court.

Mr. *A. E. Ryves*, Dr. *Satish Chandra Banerji* and Maulvi *Ghulam Mujtaba*, for the appellants.

Babu *Durga Charan Banerji*, for the respondent.

KARAMAT HUSAIN, J.—The facts which have given rise to this appeal are as follows:—

The plaintiffs brought a suit for their share, amounting to Rs. 151-8-0, in an annuity which was a charge on a 7½ biswa share in the village Anwalkhera for the years 1309, 1310 and 1311 Fasli. The defendants resisted the claim on various grounds. The learned Munsif dismissed the suit. He held that the judgment of this Court, dated the 14th August 1905, did not operate as *res judicata*, inasmuch as the subject-matter in issue in the case in which that judgment was pronounced was not the same as in the present case. He remarks:—"I do not think (that) that judgment can operate as *res judicata*, the subject-matter being different, *viz.* for a different year's charge."

The plaintiffs appealed to the District Judge. Their fifth ground of appeal was that "the question of the liability of the defendant No. 1 to pay the plaintiffs is *res judicata*."

The learned District Judge dismissed the appeal on the ground that the defendant No. 1 was not liable to pay the annuity to the plaintiffs, without deciding the plea of *res judicata*. I may mention here that the former suit was instituted in the Revenue

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Court, and that no objection was taken that the suit was instituted in the wrong Court. The learned District Judge under the provisions of section 206 of the North-Western Provinces Rent Act (Act No. XII of 1881) disposed of the appeal as if the suit had been instituted in the right Court. He remarked :—

"It is a mere quibble to say that (the) defendant admitted it as a share of revenue and not as a share of an annuity. The fact remains that Raja Govind Singh admitted his liability to pay it and offered to pay it. Now that the case has come to this Court, it is immaterial whether the suit was originally instituted in the Civil Court or the Revenue Court. The only objection that Raja Govind Singh's pleader can now raise as to paying it is that if the suit was brought in the Civil Court for the money as an annuity, his client might be able to raise some defence. But the facts have been before him for a long time, and if there is any reason why he should not pay the money, he should be able to state it in this Court. On the state of things at present disclosed the appellants are clearly entitled to receive the money."

The plaintiffs have preferred a second appeal to this Court. It is contended on their behalf that the question of the liability of the defendant No. 1 to pay Rs. 151-8-0 to the plaintiff is *res judicata* by reason of the judgment of the High Court between the same parties, dated the 14th August 1905, in Second Appeal No. 872 of 1903, and that the fact that the claim in the former litigation was for a different set of years cannot prevent the operation of *res judicata*, for the title under which the plaintiffs claimed the share of the annuity, whether for one set of years or another, was one and the same title in both cases.

To meet this contention, it is argued for the respondent (1) that the claim in the former suit was for 1306, 1307 and 1308 Fasli, while in the present suit it was for 1309-11 Fasli, and thus the subject-matter was not identical in both suits; (2) that the question of title was not determined in the former litigation; (3) that the former suit was instituted in the Revenue Court, while the present suit was brought in the Civil Court; (4) that the decision of the question of liability by the Revenue Court could not operate as *res judicata* in the present suit, which was brought in the Civil Court, and in which the question of

liability to pay the share of the annuity was in issue. See *Rani Kishori* v. *Raja Ram* (1), *Ashraf-un-nissa* v. *Ali Ahmad* (2), and *Inayat Ali Khan* v. *Murad Ali Khan* (3); and (5) that the ultimate decision of the appeal in the former suit by the High Court was immaterial, inasmuch as, for the operation of the plea of *res judicata*, the competency of the original Court which decided the former suit must be looked to and not that of the appellate Court in which the suit was ultimately decided on appeal. (See *Shebu Raut* v. *Behari Raut*, (4).

In order to see whether the question of title was raised in the former litigation, I examined the paper book of S. A. No. 872 of 1903, with the following result:—

The plaintiffs in their plaint alleged that "the plaintiffs' share amounted to Rs. 214-14-11 per annum." The defendants in their written statement admitted that "according to the village practice the plaintiffs had always been getting Rs. 151-8-0 per annum on account of the revenue of their share." They further added that the defendants always offered to pay Rs. 151-8-0, and that that sum might be awarded to the plaintiffs. The issue ran as follows:—"Whether the annual amount of revenue was Rs. 214-14-11, as claimed by the plaintiffs, or Rs. 151-8-0 as alleged by the defendants."

The first Court dismissed the claim, considering it a claim for revenue. The plaintiffs appealed to the learned District Judge, who decreed the appeal. His remarks are:—

"Now as to whether the appellants are entitled to the amount admitted in the written statement, the pleader for Raja Govind Singh contends that the written statement was a piece of foolishness on the part of the defendant's karinda, that the defendants never admitted that the plaintiff was entitled to a share of an annuity, and that the admission gives the plaintiff no title. Now formal pleas in a written statement cannot be evaded by saying that they were foolishly made by an agent. The defendant admitted that the plaintiff was entitled to receive from him annually Rs. 151-8-0 out of the assigned revenue of the share in question.

(1) (1903) I. L. R., 26 All., 468.
(2) (1904) I. L. R. 26 All., 601.
(3) (1905) I. L. R., 27 All., 569.
(4) (1908) 7 C. L. J. R., 470.

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"Although that amount has been fixed by the decision of the Court, and cannot fluctuate according to fluctuation in the revenue of the share, yet plaintiff's title is undoubtedly based on the fact that his predecessors in title had a share in the estate. The sum in question has always hitherto been dealt with by the Revenue Court, and it is a mere quibble to say that defendant admitted it as a share of revenue and not as a share of an annuity. The fact remains that Govind Singh admitted his liability to pay it and offered to pay it."

The defendants, Raja Govind Singh and Kunwar Akhay Singh, appealed to this Court, and a Bench of this Court, of which one of us was a member, dismissed the appeal on the 14th of August 1905, with the following remarks:—"It is clear on the findings that this appeal cannot be supported. The defendant appellant admitted his liability to pay Rs. 151-8-0. The District Judge gave a decree in accordance with that admission, and so acted within his right."

The above passages leave no doubt in my mind that in the previous litigation, the question of title was involved, and the liability of the defendant No. 1 to pay Rs. 151-8-0 a year to the plaintiffs was decided on his own admission. Such being the case, the judgment of this Court, dated the 14th August 1905, undoubtedly operates as *res judicata*, notwithstanding the fact that the claim in the present litigation is for a different set of years.

Chandi Prasad v. *Maharaja Mahendra Mahendra Singh*, (1) is an authority for the above proposition. The root of the matter between the parties, whether it related to 1306, 1307 and 1308 fasli, or to 1309, 1310 and 1311 Fasli, was in both cases the same, and the liability of the defendant to pay to the plaintiffs the share of the annuity amounting to Rs. 151-8-0 was decided in the former suit.

It is, however, argued for the respondent that the original Court which determined the question of the liability of the defendant to pay Rs. 151-8-0 annually was the Revenue Court, and its decision cannot operate as *res judicata* in the present suit instituted in the Civil Court.

(1) (1901) I. L. R., 24 All., 112.

There is no force in the argument. The former suit was no doubt instituted in the Revenue Court, which was the wrong Court, but no objection was taken to such institution, and the learned District Judge proceeded under section 206 of the North-Western Provinces Rent Act, which runs as follows:—

"In all suits instituted in any Civil or Revenue Court in which an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong Court shall not be entertained by the appellate Court, unless such objection was taken in the Court of first instance, but the Appellate Court shall dispose of the appeal as if the suit had been instituted in the right Court."

He disposed of the appeal as if the suit had been instituted in the right Court. Under such circumstances, the Revenue Court must be deemed to be the Civil Court, and the decision of the Revenne Court on the question of title must be held to be the decision of the Civil Court. Apart from the provisions of section 206 of the North-Western Provinces Rent Act (XII of 1881), whenever a Revenue Court has the power of directly deciding a question of title that Court for deciding that question must on principle be deemed to be a Civil Court. The determination of the question of title is the function of a Civil Court, and if the Legislature invests a Revenue Court with the power of directly deciding the question of title in certain cases, the Revenue Court in those cases becomes a Civil Court. The case of *Salig Dube* v. *Deoki Dube* (1) which lays down that when a Revenue Court, under section 199 of the Agra Tenancy Act, decides a question of title against a tenant is barred by the rule of *res judicata*, from reopening the question of title in a Civil Court, is, I think, based on that principle.

The cases of *Rani Kishori* v. *Raja Ram* (2), *Ashraf-un-nissa* v. *Ali Ahmad* (3) and *Inayat Ali Khan* v. *Murad Ali Khan* (4) have no application to the facts of the present case. In those cases the Revenue Court, under section 206 of the N.-W. P. Rent Act (XII of 1881), was not transformed into a Civil Court, nor was it invested with the power of directly deciding the

(1) Weekly Notes, 1907, p. 1.
(2) (1903) I. L. R., 26 All., 468
(3) (1904) I. L. R., 26 All., 601.
(4) (1905) I. L. R., 27 All., 569.

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question of title. Moreover, the question of title was not directly in issue in the Revenue Court in those cases. Regarding the case of *Shebu Raut* v. *Behari Raut*, it is sufficient to remark that it lays down a correct rule of law, but has no application to the case before us, in which the original Court of Revenue, by the provisions of section 206 of the old Rent Act, is deemed to be a Civil Court.

For the above reasons, I would hold that the judgment of this Court, dated the 14th August 1905, in S. A. No. 872 of 1903, operates as *res judicata*, and would allow the appeal and set aside the decrees of the Courts below and decree the plaintiff's claim with costs.

STANLEY, C. J.—I concur in the proposed order.

BY THE COURT.—The order of the Court is that this appeal be allowed, the decrees of the Courts below be set aside, and the plaintiffs' claim be decreed with costs.

Appeal decreed.

Before Mr. Justice Banerji and Mr. Justice Richards.

1908 *June* 13.

BITHAL DAS AND OTHERS (DECREE-HOLDERS) *v* JAMNA PRASAD AND OTHERS, (JUDGMENT-DEBTORS) *

Execution of decree—Refund of money realized in execution of a decree afterwards reversed in appeal—Limitation—Execution of decree stayed by injunction—Procedure.

On the 7th October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount Rs. 19,041. The decree was set aside on the 9th July 1904. The suit was retried; and on the 17th September 1904 the Court of first instance made a decree in favour of plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th December 1906. On the 17th September 1907, the respondents applied for a refund of the difference (Rs. 1,804) between the sum realized by the plaintiffs and the sum finally decreed.

Held (1) that the plaintiffs were at liberty to proceed either by application or by suit—*Shaman Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (1), *Collector of Meerut* v. *Kalka Prasad* (2) and *Shiam Sundar Lal* v. *Kaisar Zamani Begam* (3) referred to; and (2) that the application was

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*First Appeal No. 45 of 1908, from a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 29th of January 1908.

(1) (1865) 10 Moo. I. A., 203. (2) (1906) I. L. R., 28 All., 665.
(3) (1906) I. L. R., 29 All., 143.

not barred by limitation. *Harish Chandra Shaha* v. *Chandra Mohan Das* (1) distinguished.

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THE facts of this case are as follows :—

On the 7th of October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction under section 492 of the Code of Civil Procedure restraining the respondents from realizing certain money deposited in Court to their credit. After the passing of the *ex parte* decree the appellants withdrew from Court Rs. 19,041 out of the sum mentioned above in satisfaction of their decree. The decree, however, was set aside on an application made by the respondents under section 108 of the Code of Civil Procedure on the 9th of July 1904; the suit was retried; and on the 17th of September 1904 the Court of first instance made a decree in favour of the plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th of December 1906. On the 17th of September 1907 the respondents made an application to the Court for refund to them of Rs. 1,804, being the difference between the amount realized by the decree-holders and the amount subsequently decreed by the Court together with interest and costs. The Court below (Subordinate Judge of Agra) granted the application.

The decree-holders thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Babu *Sital Prasad Ghose*, for the respondents.

BANERJI and RICHARDS, JJ.—The facts out of which this appeal arises are these :—On the 7th of October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction under section 492 of the Code of Civil Procedure restraining the respondents from realizing certain money deposited in Court to their credit. After the passing of the *ex parte* decree the appellants withdrew from Court Rs. 19,041 out of the sum mentioned above in satisfaction of their decree. The decree, however, was set aside on an application made by the respondents under section 108 of the Code of Civil Procedure on the 9th of July 1904. The suit was retried; and on the

(1) (1900) I. L. R., 28 Calc., 113.

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17th of September 1904 the Court of first instance made a decree in favour of the plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th of December 1906. On the 17th of September 1907 the respondents made an application to the Court for refund to them of Rs. 1,804, being the difference between the amount realized by the decree-holders and the amount subsequently decreed by the Court, together with interest and costs. The Court below has granted the application. Hence this appeal.

Two contentions have been urged before us—(1) that the remedy of the respondent was a suit and not an application, and (2) that the application is time-barred.

As regards the first point we think that the respondents were competent to make an application for the refund of the money. The decree originally passed was superseded by the subsequent decree made in 1904. As observed by their Lordships of the Privy Council in *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (1), "if it (the decree) has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and as their Lordships conceive, is recoverable either by summary process or by a new suit or action." The respondents were therefore entitled to apply for a refund of the money and were not bound to bring a separate suit. That they are entitled to the money can admit of no doubt, and the only question is as to the form of the remedy to which they must resort for obtaining relief. The principle of the rulings of this Court in the cases of *The Collector of Meerut* v. *Kalka Prasad* (2) and *Shiam Sundar Lal* v. *Kaisar Zamani Begam* (3) applies to this case.

As to the question of limitation, the respondents did not become entitled to the money until the decree of the 17th of September 1904 was passed. It is true that on the *ex parte* decree passed on the 7th of October 1901 being set aside they might have applied to the Court to direct the appellants to refund the sum of Rs. 19,041 which they had withdrawn from the Court in pursuance of that decree, but as an injunction had been issued restraining them from withdrawing the money until the final

(1) (1865) 10 Moo. I. A., 203. (2) (1906) I. L. R. 28 All., 665.
(3) (1906) I. L. R. 29 All., 143.

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decision of the suit they could not apply for payment of the amount to them either by the Court or by the appellants. This distinguishes the present case from the case of *Harish Chandra Shaha* v. *Chandra Mohan Dass* (1). Upon the *ex parte* decree being set aside the parties were relegated to the position in which they were before the decree was made. Therefore the injunction which had been issued to the respondents under section 492 revived and remained in full force, and the respondents could not have asked for payment of the money. As we have said above, it was only when the suit was finally decided and the decree was made for a smaller sum than that which the appellants had taken from the Court that the respondents' right to a refund accrued. As their application for a refund was made within three years of that date, the application is not time-barred. We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Karamat Husain.

1908 *June* 20.

UMAN KUNWARI (DEFENDANT) *v.* JARBANDHAN (PLAINTIFF) AND RAM RAJI KUNWARI (DEFENDANT).*

Civil Procedure Code, sections 562, 588 (28)—*Remand—Appeal from order of remand filed after decision of suit in accordance therewith.*

Held that the fact that the suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. *Babu Lal* v. *Ram Kali* (2) followed. *Salig Ram* v. *Brij Bilas* (3) overruled. *Rameshur Singh* v. *Sheo Din Singh* (4), *Sheo Nath Singh* v. *Ram Din Singh* (5) and *Jatinga Valley Tea Company* v. *Chera Tea Company* (6) referred to. *Madhu Sudan Sen* v. *Kamini Kanta Sen* (7) dissented from.

THIS was an appeal in a pre-emption suit. The court of first instance (Munsif of Basti) dismissed the suit on the 30th of April 1906, but the lower appellate court (officiating Subordinate Judge of Gorakhpur) reversed this decision, and, on the 27th

* First Appeal No. 69 of 1907, from an order of Banke Bihari Lal, Subordinate Judge of Gorakhpur, dated the 27th of March 1907.

(1) (1900) I. L. R., 28 Calc., 113.
(2) Weekly Notes, 1906, p. 28.
(3) (1907) I. L. R., 29 All., 659.
(4) (1889) I. L. R., 12 All., 510.
(5) (1895) I. L. R., 18 All., 19.
(6) (1885) I. L. R., 12 Calc., 45.
(7) (1905) I. L. R., 32 Calc., 1023.

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of March 1907, remanded the case to the first court under section 562 of the Code of Civil Procedure. From this order the present appeal was preferred by the defendant vendee on the 29th of June 1907. Meanwhile, however, the court of first instance had carried out the order of remand and had decreed the plaintiff's claim on the 20th of May 1907. When the appeal came on for hearing a preliminary objection was raised to the effect that the order of remand having been carried out before the appeal was filed, the appeal could not be entertained. In view of a conflict of authority on the point thus raised the appeal was referred to a Full Bench.

Dr. *Satish Chandra Banerji* (for Babu *Jogindro Nath Chaudhri*), in support of the preliminary objection argued that two remedies were open to the appellant; either she could file an appeal from the order of remand, or she could impeach it under section 591 of the Code of Civil Procedure in an appeal from the final decree in the suit. The uniform practice of the Court at one time was not to entertain appeals similar to the present. On this question of practice *Prag Lal* v. *Raghubar Das* (1), *Ikram-un-nissa* v. *Muhammad Wazir* (2), *Karori Mal* v. *Sahodra* (3), *Salig Ram* v. *Brij Bilas* (4), and *Gulzari Mal* v. *Karim-un-nissa* (5) were referred to.

The principle which should be applied is that where the final decree in the cause has been made no separate appeal should be entertained against a prior interlocutory order, *Madhu Sudan Sen* v. *Kamini Kanta Sen* (6). The decision in *Sheo Nath Singh* v. *Ram Din Singh* (7) also supports this contention. If there is no ground for appeal against the final decree on the merits, the interlocutory order of remand cannot be impugned. This shows that a bad order of remand is not necessarily *ultra vires*; if it were, then all subsequent proceedings would be *ultra vires* and the final decree could be challenged as made without jurisdiction. In *Rameshur Singh* v. *Sheo Din Singh* (8) the order of remand was, in view of the provisions of section 564 of the Code of Civil Procedure, held to have been

(1) Weekly Notes, 1881, p. 174.
(2) Weekly Notes, 1882, p. 53.
(3) Weekly Notes, 1884, p. 5.
(4) I. L. R., 29 All., 659.
(5) Weekly Notes, 1908, p. 76.
(6) (1905) I. L. R., 32 Calc., 1023.
(7) (1895) I. L. R., 18 All., 19.
(8) (1889) I. L. R., 12 All., 510.

made without jurisdiction. But here no question of jurisdiction arises. The Court had jurisdiction to decide whether the wa-jib-ul-arz applied, and if it did take an erroneous view of the law or of the facts, the order made could in no sense be termed *ultera vires*—*Malkarjun* v. *Narhari* (1). There was no inherent absence of jurisdiction in the lower court to deal with the appeal before it, and section 578 of the Code would cover the case. *Ledgard* v. *Bull* (2) and *Mohesh Chandra Das* v. *Jamir-ud-din Mollah* (3) were referred to.

Babu *Surendra Nath Sen*, for Babu *Durga Charan Banerji*, for the appellant.

The Code of Civil Procedure gives two remedies, no doubt, but these are neither co-extensive nor alternative. The right of appeal given by section 591 of the Code is weak and doubtful; the question cannot be raised in first appeal to the lower court, and it cannot be raised even in second appeal where the final decree, by reason of findings of fact or otherwise, cannot be challenged on the merits. Section 588 of the Code is not controlled by section 586.

Thus the decree in a Small Cause Court is not open to appeal, but an order of remand is. See *Collector of Bijnor* v. *Jafar Ali Khan* (4). The new Code contains an express provision (see section 105, clause 2) which to some extent purports to modify the existing law. But neither in the new Code nor in the old is there anything to show that the intention of the Legislature is that where an order of remand has been carried out the party aggrieved cannot file an appeal against that order. Upon the question of jurisdiction reference was made to *Dhan Singh* v. *Basant Singh* (5). In *Salig Ram* v. *Brij Bilas* (6) it was assumed that the decree passed after a remand cannot be touched even though the order of remand be set aside. But, if the order of remand is a bad order, it is submitted that all proceedings in the suit, including the decree, subsequent to such order will necessarily be void.

The following cases were referred to:—

(1) (1900) I. L. R., 25 Bom., 337.
(2) (1886) I. L. R., 9 All., 191.
(3) (1900) I. L. R., 28 Calc., 324.
(4) (1880) I. L. R., 3 All., 18.
(5) (1886) I. L. R., 8 All., 519.
(6) (1907) I. L. R., 29 All., 659.

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Jarbandhan Singh v. *Nakchhed Singh* (1), *Cheda Lal* v. *Badullah* (2), *Rameshur Singh* v. *Sheo Din Singh* (3), *Mahgu Kuar* v. *Faujdar Kuar* (4), *Babu Lal* v. *Ram Kali* (5) and *Jatinga Valley Tea Company* v. *Chera Tea Company* (6).

Dr. *Satish Chandra Banerji* replied.

BANERJI, AIKMAN and KARAMAT HUSAIN, JJ.—This is an appeal from an order of remand made under section 562 of the Code of Civil Procedure in a suit for pre-emption.

The Court of first instance dismissed the suit on the 30th of April 1906, but the lower appellate Court set aside the decree of that Court and remanded the case on the 27th of March 1907. From this order the present appeal was preferred on the 29th of June 1907. Before, however, the appeal was filed, the Court of first instance had carried out the order of remand and decreed the claim on the 20th of May 1907. Hence it is contended on behalf of the respondents that the appeal cannot be entertained. As the rulings on the point are conflicting, the case has been referred to a Full Bench.

The first question we have to determine is whether an appeal lies from an order of remand passed under section 562 of the Code of Civil Procedure, if before the filing of the appeal the suit has been decided in compliance with the order of remand. In our judgment the question must be answered in the affirmative. A party aggrieved by an order of remand has, under section 588, clause (28), of the Code of Civil Procedure, a right of appeal from the order, and the period of limitation for such an appeal is ninety days under art. 156 of the second schedule to the Indian Limitation Act. Unless, therefore, the law has imposed a restriction on this right, an appeal is maintainable if it is filed within the prescribed period of limitation. We are not aware of any such restriction, and none has been brought to our notice. The learned advocate for the respondent contends that where a party has two alternative remedies and he avails himself of one of them he cannot resort to the other, and that as the appellant has allowed the remand order to be carried out his remedy is an appeal from the ultimate decree in the case, in which he can question the

(1) Weekly Notes, 1887, p. 224.
(2) (1888) I. L. R., 11 All., 35.
(3) (1889) I. L. R., 12 All., 510.
(4) Weekly Notes, 1891, p. 105.
(5) Weekly Notes, 1891, p. 187.
(6) Weekly Notes, 1906, p. 28.

validity of the order of remand. This argument is in our judgment fallacious. If after the order of remand the case is tried by the Court of first instance, it is so tried not at the instance of the party who is prejudiced by the order of remand, but in compliance with that order. It is not in the power of that party to prevent a trial, and it cannot be said that in allowing the case to be tried he resorts to an alternative remedy in respect of the order of remand. It is true that, if he can appeal to the High Court from the final decree made in the case by the lower appellate Court, he may, as held by the Full Bench in *Rameshur Singh* v. *Sheo Din Singh* (1) question the legality and correctness of the order of remand, but in such an appeal the propriety of the order of remand cannot be made the sole ground of appeal. This was so held in *Sheo Nath Singh* v. *Ram Din Singh* (2). Unless, therefore, he has a substantive ground of appeal to the High Court, he would have no remedy against the order of remand. The doctrine of election of remedies seems to us to have no application.

It is next urged that, even if the present appeal from the order of remand be entertained, the decision in the appeal will be of no avail to the appellant as the decree passed by the Court of first instance in compliance with the order of remand would still remain a valid decree. This appears to be the foundation of the decision of a Bench of this Court in *Salig Ram* v. *Brij Bilas* (3). With great deference, we are unable to agree with the learned Judges who decided that case. After the Court of first instance had once decided the case, it ceased to have any jurisdiction to hear it again except on review of judgment. Its jurisdiction to hear it a second time was derived solely from the order of remand. If that order was erroneous and is set aside, everything done in pursuance of the order must fall to the ground and be of no effect. We are in full accord with the following observations of Field, J., in *Jatinga Valley Tea Co., Ld.*, v. *Chera Tea Co., Ld.*, (4), which were approved of by Edge, C. J., in *Rameshur Singh* v. *Sheo Din Singh* (5). Field, J., said:—"It has been contended before us that the appeal ought not be heard. It is said that after the remand order the Munsif

(1) (1889) I. L. R., 12 All., 510.
(2) (1895) I. L. R., 18 All., 19.
(3) (1907) I. L. R., 29 All., 659.
(4) (1885) I. L. R., 12 Calc., 45.
(5) (1889) I. L. R., 12 All., 510.

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proceeded to make a final decree and the existence of that final decree is a bar to the hearing of the appeal against the order of remand. We are unable to concur in this contention. The law, sub-section (28) of section 588 of the Code of Civil Procedure, expressly gives an appeal against an order under section 562 remanding a case. That provision is not in any way qualified. The Code does not say that there shall be an appeal only if the case has not been finally determined in the Court of first instance before that appeal is preferred or comes on for hearing. We cannot therefore import into the Code a provision which does not there exist. The Munsif's jurisdiction to hear the case upon remand depended upon the remand order. If the remand order were badly made, the decree, and indeed all the proceedings taken under the remand order are *null* and *void*." In his judgment in *Rameshur Singh* v. *Sheo Din Singh*, Edge, C.J., after quoting the above passage, said :—" I agree with every word in the passage which I have just quoted." The other learned Judges apparently agreed with him. Mahmood, J., referring to a practice prevailing in this Court under which the Court declined to try an appeal from an order of remand under section 562 on the ground that the remand order had in the meantime been carried out, observed :—" I think I must say, after what the learned Chief Justice has said in his judgment in this case, that such a practice was erroneous." The learned Judge apparently referred to the rulings reported in the Weekly Notes, 1881, p. 211, Weekly Notes, 1882, p. 53, and Weekly Notes, 1884, p. 5, to which the learned advocate for the respondents has invited our attention. It appears to us that in the opinion of the learned judges who decided the Full Bench case of *Rameshur Singh* v. *Sheo Din* the fact of a remand order having been carried into effect before the filing of an appeal from that order or before the decision of an appeal preferred from that order would not preclude the Court from entertaining the appeal. The case of *Jatinga Valley Tea Co., Ld.*, v. *Chera Tea Co., Ld.*, referred to above was distinguished in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1) on the ground that the appeal in that case had been filed before the remand order was carried into effect. We fail, however, to see how the

(1) (1905) I. L. R., 32 Calc., 1023.

fact of the remand order having been complied with can make any difference in principle upon the question before us. In the case last mentioned the learned Chief Justice, Sir Francis Maclean, said :—" If a party desire to avail himself of the privilege conferred by section 588 in relation to an order of remand he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit." As we have pointed out above, section 588, clause (28), gives a right of appeal from an order of remand to be exercised within the period of limitation prescribed for such an appeal. To impose any other limitation or restriction on the right of appeal would be, to use the words of Field, J., " to import into the Code a provision which does not there exist." It often happens that an order of remand is carried out before the expiry of the period of limitation for the filing of an appeal. If the restriction contended for be imposed on the right of appeal, the party affected by the remand order may in many cases be without a remedy. He may not have any ground for appealing against the final decree, and he cannot, according to the rulings of this Court, appeal only on the ground that the remand order was erroneous. In our judgment the fact that the suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal, and we agree with the ruling in *Babu Lal* v. *Ram Kali* (1).

Turning now to the merits of the case, we are of opinion that this appeal must prevail. The plaintiff's claim for pre-emption is based on custom as recorded in the wajib-ul-arz. According to that document, as we read it, the custom mentioned in it prevails among members of the co-parcenary body. The property sold is what is called *arazidari* land. It does not clearly appear what the nature of *arazidari* lands is. But, after referring to various settlement reports, we find that *arazidars* are not members of the co-parcenary body. The rule of pre-emption which applies to co-parceners is not therefore applicable to them and the plaintiff's claim must fail.

(1) Weekly Notes., 1906, p., 28

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We accordingly allow the appeal, set aside the order of the Court below, and restore the decree of the Court of first instance. The appellant will have his costs here and in the Court below.

Appeal decreed.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

C. E GREY, OFFICIAL ASSIGNEE, (APPLICANT) *v.* HAZARI LAL (DECREE-HOLDER).*

1908 *July* 14.

Civil Procedure Code, section 244—Official Assignee—Disallowance of claim. of Official Assignee to have proceeds of sale in execution of decree against insolvent judgment debtor paid to him—Appeal.

Held that, the Official Assignee not being the representative of an insolvent judgment-debtor, no appeal would lie against the disallowance of his claim to have the proceeds of a sale in execution of a decree against an insolvent judgment-debtor paid over to him. *Kashi Prasad* v. *Miller* (1), *Sardarmal* v. *Aranvayal Sabhapathy* (2) and *Chandmull* v. *Ranee Soondery Dossee* (3) referred to.

THE facts out of which this appeal arose were as follows:—

One Hazari Lal obtained a decree against Dhani Ram and his son, Lachmi Narain on the 2nd of May 1907. In execution of this decree, property belonging to the judgment-debtors was sold on the 27th and 28th May 1907. The judgment-debtors were declared insolvent by the Calcutta High Court and vesting orders in respect of their property were passed in the case of Dhani Ram on the 17th May 1907 and in the case of Lachmi Narain on the 29th May 1907. The insolvents' schedules were not filed until the 7th April 1908. The appellant, who is the Official Assignee, applied to the Court below for payment to him of the proceeds of the sale. The Court below (Subordinate Judge of Cawnpore) relying on the ruling in the case of *Kashi Prasad* v. *Miller* (4) refused the application.

The Official Assignee thereupon appealed to the High Court.

* First Appeal No. 257 of 1907, from a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 5th of August 1907.

(1) (1885) I. L. R., 7 All., 752.
(2) (1896) I. L. R., 21 Bom., 205.
(3) (1894) I. L. R., 22 Calc., 259.
(4) (1885) I. L. R., 7 All., 752.

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Munshi *Gulzari Lal* and Babu *Satya Chandra Mukerji*, for the appellant.

Pandit *Moti Lal Nehru*, for the respondent.

RICHARDS and GRIFFIN, JJ.—The respondent decree-holder obtained a decree against Dhani Ram and his son, Lachmi Narain on the 2nd of May 1907. In execution of his decree, property belonging to the judgment-debtors was sold on the 27th and the 28th May 1907. The judgment-debtors were declared insolvent by the Calcutta High Court and vesting orders in respect of their property were passed in the case of Dhani Ram on the 17th May 1907 and in the case of Lachmi Narain on the 29th May 1907. The insolvents' schedules were not filed until the 7th April 1908. The appellant, who is the Official Assignee, applied to the Court below for payment to him of the proceeds of the sale. The Court below relying on the ruling of this Court in *Kashi Prasad* v. *Miller*(1) refused the application.

The Official Assignee comes here in appeal. An objection is taken that no appeal lies, on the ground that he is not the representative of the judgment-debtors within the meaning of section 244 of the Code of Civil Procedure and that this application does not relate to the execution, discharge or satisfaction of the decree and consequently no appeal lies.

The decision cited above is clearly in favour of this objection. That decision has never been overruled by this Court, and has been followed in the case of *Sardarmal* v. *Aranvayal Sabhapathy* (2) and *Chandmull* v. *Ranee Soondery Dossee* (3). With reference to these authorities we must sustain the objection and hold that no appeal lies. The result is we dismiss this appeal with costs.

Appeal dismissed.

(1) (1885) I. L. R., 7 All., 752. (2) 1(896) I. L. R., 21 Bom., 205.
(3) (1894) I. L. R., 22 Calc., 259.

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July 14.

Before Mr. Justice Richards and Mr. Justice Karamat Husain.

RAM DIHAL RAI AND OTHERS (DEFENDANTS) *v.* THE MAHARAJA OF VIZIANAGRAM (PLAINTIFF).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 91—*Mortgage—Fixed rate tenant—Suit by zamindar to redeem a mortgage made by a fixed rate tenant on the death of the tenant without heirs.*

Held that the zamindar is not, within the meaning of section 91 of the Transfer of Property Act, 1882, a person having an interest in the mortgaged property so as to entitle him to redeem a mortgage of his holding made by a tenant at fixed rates who has died without heirs. *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (1) referred to.

THIS was a suit brought by a zamindar to redeem a mortgage made by a fixed rate tenant. The plaintiff alleged that the fixed rate tenant had died without heirs and that his interest having thereby lapsed to the zamindar the plaintiff was entitled to redeem. The Court of first instance (Munsif of Ballia) found that in the event of the tenant having died childless his interest went to the Crown, and not to the plaintiff, and accordingly dismissed the suit. The plaintiff appealed. The lower appellate Court (Subordinate Judge of Ghazipur) reversed the decision of the Munsif and remanded the case for trial on the merits. Against this order the defendants appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellants.

Dr. *Satish Chandra Banerji* (for whom Babu *Jagubandhu Phani*), for the respondent.

RICHARDS and KARAMAT HUSAIN, JJ.—This was a suit brought by a zamindar to redeem a mortage made by a fixed rate tenant. The plaintiff claimed that the fixed rate tenant had died without heirs and that accordingly he was entitled to redeem the mortgage. The Court of first instance, in what we think a well-considered judgment, dismissed the claim. The lower appellate Court reversed the decree of the Court of first instance and held that the plaintiff was entitled to redeem. The learned Judge commences by saying that the admitted facts of the case are that the tenancy was a fixed rate tenancy and that the tenant had died heirless. The lower appellate Court ought

* First Appeal No. 31 of 1908, from an order of Srish Chandra Bose, Subordinate Judge of Ghazipur, dated the 22nd of January 1908.

(1) (1876) L. R., 3 I. A., 92.

to be very careful in stating that facts are admitted unless they really are. This Court has to accept the findings of fact of the lower appellate Court. In the present case the onus of proving that the tenant died heirless lay upon the plaintiff, and we need hardly say that this was a onus which it would be extremely difficult for any plaintiff to discharge. We doubt very much whether the fact that the tenant died without heirs was ever admitted by the defendants. However, in the view which we take, this matter is not very material. In our judgment the tenancy did not lapse upon the death of the tenant without heirs. The tenancy has now vested in the Crown if the tenant died without heirs—*Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (1). In order to redeem the person seeking redemption must have an interest in "the mortgaged property." The mortgaged property in the present case was the interest of a fixed rate tenant, and the mere fact that the zamindar has a proprietary interest in the land out of which the interest of a fixed rate tenant is carved does not give him "an interest in the mortgaged property" within the meaning of section 91 of the Transfer of Property Act.

Both parties admit that the same question as arises in this appeal arises in F. A. f. O. 33 of 1908 and that the same judgment rules both cases.

We allow the appeal, set aside the decree of the Court below, and restore that of the Court of first instance with costs in all Courts.

Appeal decreed.

(1) (1876) L. R., 3 I. A., 92.

1908
July 23.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

KASHI PRASAD AND ANOTHER (DEFENDANTS) *v.* INDA KUNWAR (PLAINTIFF).*

Hindu law—Hindu widow—Widow in possession of husband's estate as inferior proprietor—Effect of enlargement of estate of inferior proprietor by action of Government—Mukaddam.

An under-proprietor, whose status was described by the term "mukaddam," died, and his estate devolved upon his widow. Whilst this estate was in the possession of the widow, the Government proceeded to make a settlement with the mukaddams, excluding the superior proprietor, to whom an allowance by way of malikana was given. *Held* that the enlarged estate of which the widow thus became possessed was still a Hindu widow's estate merely: the action of Government had not the effect of making her a zamindar with a title independent of that which she derived from her husband. *Keech* v. *Sandford* (1) referred to by Stanley, C.J.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, and Dr. *Satish Chandra Banerji* for the appellants.

The Hon'ble Pandit *Sundar Lal* (for whom Babu *Jogindro Nath Chaudhri*) for the respondent.

STANLEY, C.J.—This appeal arises out of a suit for possession of a share in the village of Kanai Shibnagar in the district of Bareilly and for mesne profits. The facts are these. One Newal Rai was the owner of this as well as other property. He died before the year 1872, leaving a widow Musammat Jaika and two daughters, namely, Musammat Bilaso and Musammat Hulaso. One Banarsi Das purchased the property in suit at a sale in execution of a decree obtained against Musammat Jaika. The defendants Kashi Prasad and Basdeo Sahai are the brothers of Banarsi Das, who is dead. Five kachwansis of the property is in the possession of the defendants 3 to 8, and as to this portion the plaintiff's suit has been dismissed and we are not concerned with it in the present appeal. Musammat Jaika died on the 27th of November 1878, and after her death, her daughters Bilaso and Hulaso, sold ¾ of the property to Musammat Lachman and three others. A suit was brought by the vendor and vendees for possession of the village of Hafizpur, not the village in dispute, and

* First Appeal No. 276 of 1906 from a decree of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 15th of June 1906.

(1) (1726) 2 W and T, 7th edn. p., 693.

the suit was decreed on the 18th of May 1881, and on appeal the decree for possession was affirmed by the High Court. Musammat Hulaso died in the year 1894 and her sister Musammat Bilaso died on the 15th of September 1895. Musammat Hulaso left a son Majnun Lal, and he on the 15th of June 1904 sold the village in dispute to the plaintiff Musammat Inda Kunwar. The present suit was instituted on the 11th of December 1905, so that it was brought within 12 years from the deaths of Musammat Hulaso and Musammat Bilaso.

One of the defences set up was that the debt of Musammat Jaika, in respect of which the property was sold, was incurred for legal necessity. This defence was not established, and it has not been raised before us. Another plea raised was in regard to the ¾ of the property which was sold by Musammat Hulaso and Bilaso on the 8th of January 1881. The plea was that this sale was carried out for legal necessity and that the plaintiff, as legal representative of Majnun Lal, was bound by it. This is the subject of the connected appeal No. 280 of 1906.

As to the entire of the village the main and important defence was that the property was not the estate of Newal Rai and did not devolve on Musammat Jaika as his heir; that Newal Rai was only a *mukaddam* of the property, being recorded as lambardar, and that, after his death, the Government conferred proprietary rights on Musammat Jaika, and she thus acquired the absolute estate and did not inherit it from her husband, and that consequently Banarsi Das, who purchased the property at a sale in execution of a decree obtained against Musammat Jaika, acquired an absolute estate in it. This was the main contention before us of the defendants appellants.

The circumstances which led to the intervention of Government in regard to this estate were these. Raja Kheri Singh owned the village in dispute and a number of other villages as zamindar, but under him were inferior proprietors, who are described as *mukaddams*. Raja Kheri Singh made default in payment of the Government revenue, and in consequence the Government determined to make settlements with the under-proprietors and the under-proprietors engaged with the Government for the payment of the Government revenue, and a *malikana*

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allowance of Rs. 10 per cent. of the Government revenue was allowed to the Raja. The settlement was so made with Musammat Jaika after the death of her husband, and it is this settlement which forms the basis of the claim that Musammat Jaika by grant from Government became in her own right the absolute owner of the village in dispute with other property. It does not appear that any sanad was granted by Government to Musammat Jaika. The only evidence which has been laid before us on the subject is some records from the settlement department and also judgments of the Civil Courts. One of the records in question is a proceeding before the Settlement Collector of Bareilly, dated the 4th of September 1870, relating to a settlement of the village of Kanai Shibnagar (No. 58C of the record). In it the reason is assigned for the nomenclature of the village and successive transfers, and from it we gather that the village was populated by Hari Ram *mukaddam* about 300 years ago, that subsequently the village site was washed away by the floods of the Ram Ganga, and that it was afterwards populated by one Sewa Ram. Then follows this statement :—" At the time of the former settlement Ranis Rup Kunwar and Bas Kunwar, wives of Raja Kheri Singh, were the zamindars, and Ganga Ram, Khayali Ram, Gajadhar, Tilok Chand and Newal Rai, *mukaddams*, the lambardars of this village. After the settlement, Newal Rai died and in his stead the name of Musammat Jaika was entered as a lambardar." Then later on an order of the Lieutenant-Governor, dated the 24th of June 1851, is recited to the effect that the zamindari of this village was conferred upon certain persons, who are named, and amongst others as to 6 biswas, 13 biswansis and 5 kachwansis on Ganga Ram and Musammat Jaika. Later on we find the statement that on the 10th of March 1862, an order, together with a list of taluqdari villages of Raja Kheri Singh, was received from the Lieutenant-Governor to the effect that the *mukkaddams* should pay to the heirs of Raja Kheri Singh Rs. 10 per cent. of the Government revenue as *malikana* allowance.

In the khewat of the village of Kanai Shibnagar, dated the 8th of January 1870, there appears in the last column the following statement :—" There are two kinds of proprietors in this village, *i.e.*, one superior and the other inferior. As under the

order of the Government the inferior proprietors have been charged with the payment of revenue, the settlement of this village has been made with them. Raja Partab Singh, the adopted son of Ranis Rup Kunwar and Bishen Kunwar, widows of Raja Kheri Singh, has been declared to be the superior proprietor of this village. Rupees 134 on account of *malikana* allowance due to him shall, as per detail given in column 13, be paid into the Tahsil, and he will continue to receive it from the Tahsil treasury. He shall have nothing to do with the collections and assessments of the village."

It appears that the widows of Raja Kheri Singh instituted a suit as his representatives to recover zamindari and malguzari possession of the entire estate of Raja Kheri Singh, including 87 mauzas, and to set aside the decision of the Settlement Officer, dated the 24th of June 1851, by which the plaintiff's claim was rejected and the zamindari title of Ghulam Husain and others was recognized. The Judge of Bareilly decreed the plaintiffs' claim, whereupon an appeal was preferred to the Sadr Dewani Adaulat, and we have on the record a copy of the judgment of that Court, dated the 27th of August 1861. In that judgment a short history of the estate is to be found, and official reports are quoted as elucidating the fiscal history of the estate and the positions of the conflicting claimants. From this it appears that at the cession the name of Kunwar Kheri Singh was recorded as proprietor of the entire pargana, but that the first settlement was concluded generally with the *mukaddams*; that at the second settlement Kunwar Kheri Singh engaged for 21 villages, and at the third settlement for 26, but that owing to his incapacity and the fact that the revenue had fallen into arrears, Kunwar Kheri Singh was excluded from the settlement and a suitable provision was made for him as an equivalent for his exclusion from the management of the estate. The learned Judges held that the allowance in question was actually granted as a *malikana* allowance, and that the plaintiffs possessed a proprietary title to some extent in all the villages claimed, but that the defendants, who then engaged with Government for the 54 mukaddami villages were possessed of proprietary rights in these villages of a heritable and transferable nature. The conclusion at which the

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learned Judges arrived was, that in the case of the 54 mukaddami villages there existed an inferior proprietary right, heritable and transferable, which was vested in the defendants then engaging for these mauzas.

We gather from this that there was no actual confiscation by Government of the superior proprietary right of Raja Kheri Singh and no grant of that estate to the inferior proprietors. What the Government did was to settle for the revenue with the inferior proprietors reserving to Raja Kheri Singh in respect of his superior proprietary rights a *malikana* allowance. The inferior proprietors no doubt thus acquired zamindari rights which they had not previously enjoyed, but these rights were acquired by virtue of and not independently of their pre-existing estate. The inferior estate became as it were merged in the superior interest thus, I may say, usurped. Musammat Jaika had succeeded on the death of her husband Newal Rai to his estate, and was recorded in the revenue papers as lambardar. Then by virtue of the order of His Honour the Lieutenant-Governor to which I have referred she and Ganga Ram acquired zamindari rights in respect of 6 biswas 13 biswansis 5 kachwansis in the villages in question, of which Musammat Jaika was entitled to one-half. It is difficult to see how the accretion to her rights thus acquired can be regarded as equivalent to a grant by Government to Musammat Jaika in her own right of the estate which formerly belonged to her husband, so as to enable her to deal with it as her absolute property and disappoint the expectation of her daughters and the other reversionary heirs of her husband to whom the property would in the ordinary course have come upon her death.

The learned Subordinate Judge held that Musammat Jaika inherited the property from her husband, and did not in her own right acquire the zamindari rights which Government conferred. He observes as follows :—"It seems clear to my mind that as Musammat Jaika's name was entered in the revenue papers in respect of her husband's lambardari rights as heir of her husband, the zamindari rights in the shares in dispute were also conferred on her by Government as representing her deceased husband and as his heir, and she herself had done nothing to merit the

grant of zamindari rights to her, and she might never have acquired the zamindari rights had she not been heir and wife of Newal Rai deceased."

I think that the learned Subordinate Judge was right in the conclusion at which he arrived. Musammat Jaika acquired the property of her husband for a Hindu widow's estate, and by virtue of her ownership derived from her husband acquired from Government the zamindari rights which had not previously been enjoyed. The acquisition of these must, I think, be taken to be an enlargement merely of the interest to which she was entitled as the widow of Newal Rai, and as such be treated as acquired for the benefit of all persons interested as reversioners in the estate of Newal Rai. Even if the act of Government amounted to a grant of the zamindari rights to Musammat Jaika, it appears to me that the doctrine of graft which is so fully dealt with under the leading case of *Keech* v. *Sandford* (1) would be applicable. The rule laid down in the principal case is that when a trustee of lease-hold property renews the lease in his own name, he must hold the renewed lease for the benefit of his *cestui que trust*. This rule has been extended and it is applicable to the case of a purchase of the reversion of an estate by a tenant for life, and is based in such case upon the duty which lies upon a limited owner to act in a matter of the kind for the benefit of the whole interest. The principle is embodied in the Indian Trusts Act, 1882. Section 90 of that Act prescribes that "where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property gains any advantage, he must holb for the benefit of all persons so interested the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage." Here Musammat Jaika, who inherited from her husband his estate as tenant for life acquired from Government

(1) (1726) 2 W. and T., 7th Edn, p. 693.

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the zamindari rights which had belonged to Raja Kheri Singh by virtue of her position as qualified owner, and thus gained an advantage in derogation of the rights of the other persons interested in the property. Consequently she was bound to hold the advantage so gained for the benefit of all persons so interested. If she had not been tenant for life of the property of her husband, Government would undoubtedly not have settled with her for the revenue. It was by virtue for her possession of the estate as his widow, and not otherwise, that she obtained the concession of zamindari rights from Government. If therefore there was a grant from Government to her, she became I think, a constructive trustee of the rights so acquired for the parties entitled to the whole interest.

For the foregoing reasons I would dismiss the appeal.

BANERJI, J.—I also am of opinion that the appeal should be dismissed. In my judgment the effect of the settlement with Musammat Jaika was to enlarge the widow's estate which she held as heir to her husband Newal Rai. As such widow she held a life estate in the rights of Newal Rai as mukaddam. When the Government made a settlement with her and Ganga Ram, the brother of Newal Rai, it only enlarged the mukaddami rights held by them. So that the enlarged rights were held by her in the same capacity in which she held the original rights, namely, as a Hindu widow. I see no reason to assume that absolute rights as proprietor were conferred on her by Government. She was not therefore competent to make the transfer in suit. I express no opinion on the question of graft or on the question whether she may be deemed to have been a trustee for the persons entitled to the estate.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908
July 24.

RAM CHANDAR (DEFENDANT) *v.* KALLU AND OTHERS (PLAINTIFFS).*

Act No. IV of 1882 *(Transfer of Property Act), section* 91—*Redemption of mortgage—Reversionary heirs of deceased husband of Hindu widow not entitled to redeem mortgage made by husband.*

Held that the reversionary heirs of the deceased husband of a Hindu widow in possession as such of her husband's property are not persons who, within the meaning of section 91 of the Transfer of Property Act, 1882 have such an interest in the mortgaged property, as would entitle them during the life-time of the widow to redeem a mortgage made by the husband.

THE facts which gave rise to this appeal are as follows:—Diwan Singh mortgaged certain property to one Durga. The mortgagor died leaving a widow Musammat Ram Dei, who took possession of the property. The mortgagee sold his interest to one Ram Chandar. The present suit was brought by the person who would have been the reversionary heirs of Diwan Singh had the widow died at the date of its institution, and they asked to be allowed to redeem the mortgage made by Diwan Singh. The Court of first instance (Munsif of Khurja) gave the plaintiffs a decree, and this decree was, with some modification, affirmed by the Additional District Judge. The defendant mortgagee appealed to the High Court.

Mr. *Muhammad Raoof*, for the appellant.

Lala *Girdhari Lal Agarwala*, for the respondent.

STANLEY, C. J., and BANERJI, J.—The question raised in this appeal is whether persons who claimed to be reversionary heirs of a deceased mortgagor can, during the life-time of the mortgagor's widow, redeem a mortgage executed by the deceased. Diwan Singh was the mortgagor, and he executed the mortgage in question in favour of one Durga. His widow Musammat Ram Dei, is now in possession of the property. Ram Chandar, the defendant appellant, is a purchaser from Durga. No authority is shown for the proposition that a reversionary heir, who may or may not according to the circumstances ever come into possession of an estate, is entitled to redeem. The plaintiffs have no present interest in the property. Their interest is contingent upon their surviving the mortgagor's widow. The Court of

* Second Appeal No. 486 of 1907 from a decree of J. H. Cuming, Additional Judge of Aligarh, dated the 29th of January 1907, affirming a decree of Ganga Prasad, Munsif of Khurja, dated the 10th of September 1906.

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RAM CHANDAR v. KALLU.

first instance gave a decree for redemption and directed that on payment of the mortgage debt the plaintiffs should be put into possession. Now it is obvious that the plaintiffs have no right to possession in the life-time of the mortgagor's widow. Therefore this provision of the decree is clearly wrong. Upon appeal the learned District Judge affirmed the decision of the Court below, with this modification that he directed that the provision in the decree awarding possession to the plaintiffs should be struck out. Notwithstanding this direction we find in the decree the same provision for possession. In it, it is stated that in the event of payment of the mortgage debt by the plaintiffs they shall be put into possession of the mortgaged property. On turning to section 92 of the Transfer of Property Act, it is obvious that the provisions of that section cannot be complied with, if the suit is one by reversionary heirs, as is the case here, seeing that they are not entitled to possession of the mortgaged property and may never be so entitled. That section also provides that if payment is not made of the mortgaged debt in accordance with the earlier provision of the section, the plaintiff is to be absolutely debarred of all right to redeem the property or that the property be sold. This provision would be inapplicable to the case of plaintiffs who are only reversionary heirs and who may ultimately never become entitled to the property. It would not be binding upon other parties who upon the death of the widow would become actually entitled to it as heirs. The plaintiffs respondents rely upon the language of section 91 (*a*) as giving them a right to redeem. This section provides that any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property may redeem, and the contention is that the plaintiffs-respondents have such an interest. We think that the interest there referred to is a present interest and not a mere contingent right such as the plaintiffs possess. In view of the difficulty of carrying out a decree for redemption in a case of the kind, particularly in cases in which persons are entitled to an interest in the property for life in succession, as for instance the widow of a deceased mortgagor and after her the daughters of such mortgagor, we do not see our way to extend the meaning of the word "interest" as used

widow of her life estate. For these reasons we allow the appeal. We set aside the decrees of both the lower Courts and dismiss the suit with costs in all Courts.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908
July 31.

MUJIB-ULLAH (JUDGMENT-DEBTOR) *v.* UMED BIBI, (DECREE-HOLDER).*

Execution of decree—Limitation—Application in continuation of previous proceedings in execution.

On the 7th December 1903, the sale of certain immovable property, which had been attached, was ordered. On the 30th January 1904, the amin reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January 1906, the decree-holder again applied, asking that the property, which was still under attachment, might be sold. *Held* that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. *Dukhiram Srimani* v. *Jogendra Chandra Sen* (1) distinguished. *Rahim Ali Khan* v. *Phul Chand* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of Aikman, J. The facts of the case are stated in the judgment under appeal, which was as follows:

AIKMAN, J.—This appeal arises out of an application to execute a decree for money passed upwards of a quarter of a century ago. As the learned District Judge remarks, the case "illustrates in a remarkable manner the protracted nature of proceedings in execution of a decree in those cases where the judgment debtor is not anxious to pay off the amount decreed." The decree was passed on the 14th May 1880. Various applications were made for execution, and some portion of the decretal amount was realized. On the 30th of June 1899 the decree holder presented an application to realize the balance due under

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* Appeal No. 9 of 1908, under section 10 of the Letters Patent.

(1) (1900) 5 C. W. N., 347. (2) (1896) I. L. R., 18 All., 482.

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MUJIB-ULLAH v. UMED BIBI.

the decree by attachment and sale of certain immovable property. The judgment-debtor pleaded that the application was barred under the provisions of section 230 of the Code of Civil Procedure. The Court of first instance overruled the objection, but on appeal, the District Judge sustained it. The decree holder appealed to this Court which on the 20th of June 1902 reversed the order of the lower appellate court and restored that of the court of first instance, treating the then application as one in continuation of the previous application, which was within time, but which had proved abortive owing to the institution of a suit to set aside a sale. This Court accordingly remanded the case under the provisions of section 562 of the Code of Civil Procedure to the court executing the decree. When the order of this court was received in the court below, the application of the 30th June 1899 was restored to its original number in the register and a date fixed for the sale of the property. The sale did not come off on the date fixed owing to objections filed by the judgment-debtor as to the amount due under the decree. These objections were finally disposed of on the 10th of September 1903. On the 7th December 1903 the Court ordered the sale of the property which had been attached to recover the amount found to be due from the judgment-debtor. On the 30th of January 1904 the Amin reported that he had been unable to hold the sale as there were no bidders. On the 1st of February 1904 intimation of this was ordered to be given to the decree-holder. On the 3rd February 1904 the Court recorded an order to the effect that, notwithstanding intimation, the decree-holder had not proceeded with the case or paid in fresh process fees for proclamation of a second sale, or deposited the costs of the Amin, and ordered the decree-holder to pay the necessary fees by the 10th February, stating in its order that no further time would be allowed. On the 10th February the Court recorded an order to the effect that, no fees having been paid, it appeared that the decree-holder did not wish to proceed with the case, which was accordingly ordered to be struck off "for the present," costs being awarded against the decree-holder. The decree-holder took no further steps until the 13th of January 1906, when he put in an application asking that the property

which, it appears, was still under attachment and which had not been sold previously owing to the absence of bidders, might now be sold. Objection was taken by the judgment-debtor on the ground that the application was a fresh application and was beyond time. This objection was overruled by the learned Subordinate Judge, who held that it was not a fresh application but merely one to revive the preceding application. On appeal the learned District Judge took the same view, holding that the present application was merely in continuation of the former. The judgment-debtor comes here in second appeal. The case has been well argued by the learned vakil who appears to support the appeal, but after considering the authorities cited by him I see no ground for differing from the conclusion arrived at by the courts below. On behalf of the appellant reliance is placed on the decision in *Dukhiram Srimani* v. *Jogindra Chandra Sen* (1) the facts of which are somewhat similar to those of the present case. There is this material distinction, however, that in the case relied on the application under consideration was made upwards of four years after the previous application. Here there was no doubt considerable delay on the decree-holder's part, and if he had taken no steps for three years I should have held the application to be barred. The respondent here had obtained an order for the sale of certain property. That order was not carried out, but this was for no fault of the decree-holder. He now asks that the previous order for the sale of the property, which is still under attachment, should be carried out. I think therefore that the present application must be deemed to be in continuation of the previous application. This view seems to me supported by what was said in the Full Bench case of *Rahim Ali Khan* v. *Phul Chand* (2) and the observations of the Privy Council in *Raja Muhesh Narain Singh* v. *Kishanund Misr* (3) at page 337 of the judgment. For these reasons I am of opinion that the appeal fails and I dismiss it with costs.

On this appeal

Dr. *Satish Chandra Banerji*, for the appellant

(1) (1900) 5 C. W. N., 347 (2) (1896) I. L. R., 18 All., 482.
(3 (1862) 9 Moo., I A., 324.

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Maulvi *Muhammad Ishaq* (for whom Babu *Sital Prasad Ghosh*), for the respondent.

STANLEY, C.J.—The question in this appeal is whether an application for execution made on the 13th of January 1906, is barred by the provisions of section 230 of the Code of Civil Procedure. Both the lower Courts, as also a learned Judge of this Court, have held that it is not so barred. The circumstances of the case are somewhat peculiar. It is an order of the 10th of February 1904, upon which the real question in my opinion turns. It appears that an application for execution was made by the decree-holder, and the property was attached and directed to be sold. A proclamation for sale was issued, but the sale proved abortive owing to the absence of bidders. Thereupon the decree-holder was required to pay amin's fees and also the fees for a further sale notification. It seems to me that this was not a proper order in view of Rule 388 of the Rules of Court of the 4th April 1894. That rule provides, amongst other things, that no fee shall be chargeable for serving or executing any process issued a second time in consequence of an adjournment made otherwise than at the instance of a party. Now the adjournment in this case was not at the instance of the decree-holder. It was rendered necessary by the fact that no bidders attended at the sale, and therefore, in the absence of authority to the contrary, I should be prepared to hold that the Court was not justified in requiring the decree-holder to pay further fees. The decree-holder did not pay further fees within the time fixed, notwithstanding that several opportunities were given him for the purpose of making such payment. In consequence of his default the order of the 10th of February 1904 was passed. By that order, after stating that the decree-holder had not deposited auction fees in spite of demands, it was directed that the execution case should be for the present struck off the list of pending cases, the decree-holder to pay the costs of execution. It seems to me upon the language of this order that it amounted to nothing more than a direction that the proceedings should remain in abeyance for the time being. It was not a final order disposing of the execution application. If this was not so, the words 'for the present' would be meaningless. In this view it appears

to me that the case is not similar to that of *Dhukiram Srimani* v. *Jogindra Chandra Sen* (1), which has been relied upon by Dr. *Satish Chandra Banerji*, in which it was held that a subsequent application was not a continuation of a previous application for execution "inasmuch as there was a clear break in the continuity by reason of the decree-holder's omission to deposit the costs for service of a fresh sale proclamation and thereby the previous proceeding came to an end." Here the previous proceeding did not come to an end, but was kept in abeyance. It appears to me that the case more nearly resembles that of *Rahim Ali Khan* v. *Phul Chand* (2). For these reasons I think that the application of the 13th of January 1906, was a proper application and was rightly granted. For these reasons I would dismiss the appeal.

BANERJI, J.—I also would dismiss the appeal. The decree in this case was passed on the 20th of May 1880. The application made on the 13th of January 1906 would therefore be barred under the provisions of section 230 of the Code of Civil Procedure, if it could be treated as an application for execution within the meaning of that section. A previous application for execution had been made within 12 years from the date of the decree, and if the proceedings which took place in pursuance of that application were not determined by reason of the Court dismissing the application, the present application might properly be regarded as an application in continuation of the previous application. The question whether the present application is a fresh application for execution turns on the meaning and effect of the order of the 10th of February 1904, by which the proceedings in execution under the previous applications were terminated. That order directs the execution case to be removed from the list of pending cases "for the present." The Court must have used the words "for the present" with some purpose. It did not order the property which had been attached to be released from attachment. The use, therefore, of the words "for the present," seems to indicate that what the Court intended was only to keep the execution proceedings in abeyance to be renewed again. Under these circumstances the application of the 13th

(1) (1900) 5 C. W. N., 347. (2) (1896) I. L. R., 18 All, 482

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of January 1906, may be reasonably assumed to be an application for the revival of the proceedings which had been kept in abeyance by the order of the 10th of February 1904. In the Full Bench case of *Rahim Khan* v. *Phul Chand* (1) it was held that a subsequent application will not necessarily be deemed to be a fresh application for execution, if by reason of objections on the part of the judgment-debtors or action taken by the Court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution could not be obtained. In the present instance, it seems, the decree-holder was not bound, having regard to Rule 388 of the Rules of the 4th of April 1894, to pay fresh fees for the issue of a proclamation of sale a second time. There was therefore no default on his part and the proceedings were not terminated in consequence of his omission to do something which he was bound to do. That, in my opinion, is another reason why the subsequent application of the 13th of January 1906, should not be treated as a fresh application for execution. It should be held to be, as it purported to be, an application in continuation of the previous application for execution. For these reasons I agree with the learned Judge of this Court from whose judgment this appeal has been preferred in holding that the application for execution is not barred.

By THE COURT.—The order is that the appeal be dismissed with costs.

Appeal dismissed.

(1) (1896) I. L. R., 18 All., 482

Before Mr. Justice Karamat Husain and Mr. Justice Griffin.

1908
August 4.

PACHKAURI RAM AND OTHERS (PLAINTIFFS) *v.* NAND RAI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, sections 508 *et seqq—Arbitration—Award—Award set aside—Court not empowered to make a second reference on the same submission.*

The parties to a suit pending in the Court of a Munsif referred the matters in dispute between them to arbitration. An award was made and delivered: but it was afterwards discovered that one of the plaintiffs had died before the termination of the arbitration proceedings, and the Munsif accordingly set aside the award. *Held* that the Munsif had no power to make a second order on the same agreement of the parties again referring to arbitration the matters in dispute between them.

THE facts of this case are as follows:—

The suit out of which this appeal has arisen was brought for recovery of possession of a plot of land. The suit was referred to arbitration on the 4th of March 1907. The arbitrators submitted their award on the 2nd of April 1907. On the 11th of April 1907 objections were filed by the defendant. One of the objections was that one of the plaintiffs had died and that his heirs had not been brought on the record. The Court (Munsif of Ghazipur) on the 20th of April 1907, set aside the award and sent back the case to the arbitrators for decision, giving them time up to the 4th of May 1907.

The arbitrators made a fresh award and the Munsif passed a decree in accordance with that award. The defendants appealed and the appellate court (Subordinate Judge of Ghazipur) sent the case back under section 562 of the Code of Civil Procedure. From that order the plaintiffs appealed to the High Court.

Mr. *M. L. Agarwala,* for the appellants.

Babu *Beni Madho Ghosh,* for the respondents.

KARAMAT HUSAIN, J.—The suit out of which this appeal has arisen was brought for recovery of possession of a plot of land. The suit was referred to arbitration on the 4th of March 1907. The arbitrators submitted their award on the 2nd of April 1907. On the 11th of April 1907, objections were filed by the defendants. One of the objections was that one of the plaintiffs had died and that his heirs had not been brought on the record. The learned Munsif on the 20th of April 1907, set aside the

* First Appeal No. 113 of 1907 from an order of Srish Chandra Bose, Subordinate Judge of Ghazipur, dated the 10th September 1907.

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PACHKAURI RAM v. NAND RAI.

award and sent back the case to the arbitrators for decision, giving them time up to the 4th of May 1907. He said :—"The arbitrators have submitted their award. It is objected to on the ground, *inter alia*, that one of the plaintiffs had died during the arbitration and before the award, hence the award is illegal. I am of opinion that this contention must prevail. The plaintiff Gopichand died two weeks before the 12th of April 1907. The arbitrators not only delivered and made the award on the 2nd of April 1907, but they examined witnesses on the 1st of April 1907, *i.e.*, after the death of one of the plaintiffs. Of this fact (*i.e.* the death of one of the plaintiffs) the other plaintiff, the defendants, and possibly the arbitrators, could not have been ignorant. Hence the award is defective, as the representatives of the deceased plaintiff had not been brought on the record before the case was heard and award made by the arbitrators. Under these circumstances the ruling in *Chetan Charan Das* v. *Balbhadra Das* (1) would not apply. The award must therefore be set aside. As the representative of the deceased; plaintiff has been brought upon the record and he agrees to the submission, it is ordered that the award of the 2nd of April 1907, be set aside and the case be sent back to the arbitrators for decision. The arbitrators are given time up to the 4th of May 1907, to make their award."

The arbitrators made a fresh award and the learned Munsif passed a decree in accordance with that award. The defendants appealed and the learned Subordinate Judge sent the case back under section 562 of the Code of Civil Procedure. The plaintiffs have preferred an appeal from that order.

It is contended on their behalf that the Court of first instance was competent to refer the case again to the arbitrators; that its action amounted to a remission under section 520 (*c*) of the Code of Civil Procedure, and that no appeal lay to the lower appellate Court.

There is no force in these contentions. The learned Munsif in express terms set aside the award of the 2nd of April 1907, as his order of the 20th of April 1907, and his judgment of the 15th of May 1907, show, and I cannot construe his order of the

(1) (1899) I. L. R., 21 All., 314.

2nd of April 1907, to mean that he remitted the award under section 520 (*c*). No objection to the legality of the award was apparent on the face of it. The learned Munsif could not, therefore, remit it under section 520 (*c*). See *Nanak Chand* v. *Ram Narayan* (1). His finding that the arbitrators examined the witnesses after the death of one of the plaintiffs and his remarks that the ruling in I. L. R., 21 All., 314, does not apply, clearly show that he, acting under section 521 (*a*), set aside the award of the 2nd of April 1907, and it is too late to discuss now that he, in the absence of an express finding that the arbitrators had knowledge of the death of Gopi Chand, was not justified in setting the award aside. He did set it aside, and both the parties submitted to that order, and they cannot attack that order at this stage of their litigation. It is, however, argued that the award of the 2nd of April 1907, in consequence of recording evidence after the death of one of the plaintiffs was waste paper, that the Munsif ignoring it could, on the basis of a subsisting agreement to refer to arbitration (see I. L. R., 27 Mad., 112), refer it to arbitration again. No section of the Code of Civil Procedure is quoted in support of this argument, and the help of the inherent powers of a Court of justice is invoked to legalize the action of the Court. This argument is of no use. Because after setting aside the first award the power of the learned Munsif to refer the matters in dispute was exhausted.

When a matter in difference has once been referred to arbitration, the Court by section 508 is precluded from dealing with it, save in accordance with the provisions of succeeding sections, and none of them confers upon that Court a power to refer the matters in difference again to arbitration. The inherent powers of a Court of Justice in opposition to the express provisions of section 508 of the Code of Civil Procedure are of no avail.

For the above reasons I would hold that the order of the lower appellate Court is right and would dismiss the appeal with costs.

GRIFFIN, J.—The question is not to my mind free from doubt, but I am not prepared to differ from the conclusion arrived at by my learned colleague. I concur in the proposed order.

(1) (1879) I. L. R., 2 All., 181.

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PACHKAURI RAM v. NAND RAI.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

1908 *August 4.*

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAM KALI (DEFENDANT) *v.* JAMMA AND ANOTHER (PLAINTIFFS). *

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 22—*Occupancy holding—Succession—"Male lineal descendant"—Illegitimate son—Hindu law.*

Held that the illegitimate son of a man belonging to one of the Sudra caste by a kept woman, or continuous concubine, was capable of succeeding to the occupancy holding of his father as a "male lineal descendant" within the meaning of section 22 of the Agra Tenancy Act, 1901. *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1), *Sarasuti* v. *Mannu* (2) and *Hargobind Kuari* v. *Dharam Singh* (3) referred to.

ONE Mahtab Singh, an occupancy tenant, had a son Ghansham Singh, by a concubine with whom he had lived for a considerable period, Musammat Jamuna. Mahtab Singh died, and on his death Jamuna and Ghansham Singh applied in the revenue court for the entry of their names in respect of Mahtab Singh's occupancy holding. Their application was refused, and they accordingly brought the present suit, in which they asked for a declaration that Jamuna was the wife and Ghansham Singh the son of Mahtab Singh and that as such they were entitled to succeed to Mahtab Singh's occupancy holding. The court of first instance (Munsif of Chandausi) decreed the claim and this decree was in appeal upheld by the Additional Judge of Moradabad. The defendant appealed to the High Court.

The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Iswar Saran* for the appellant.

Babu *Durga Charan Singh* (for whom Babu *Beni Madho Ghosh*), for the respondents.

STANLEY, C.J., and BANERJI, J.—The question in this second appeal is whether the plaintiff respondent, Ghansham Singh, who is the illegitimate and only son of one Mahtab Singh, deceased, by a concubine who had lived continuously with Mahtab Singh, is entitled to the occupancy holding of his father as

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* Second Appeal No. 355 of 1907, from a decree of W. F. Kirton, Additional Judge of Moradabad, dated the 19th December 1906, confirming a decree of Kunwar Sen, Munsif of Chandausi, dated the 6th of June 1906.

(1) (1869) 13 Moo., I. A., 141. (2) (1879) I. L. R., 2 All., 134.
(3) (1884) I. L. R., 6 All., 329.

a male lineal descendant within the meaning of that expression as used in section 22 of the Agra Tenancy Act. The Courts below have rightly held that Mahtab Singh belonged to the Sudra caste.

Both the lower Courts held that the plaintiff was so entitled. We think that their decision is right. In *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1) their Lordships of the Privy Council held that the illegitimate children of the Sudra caste, in default of legitimate children inherit their putative father's estate. In *Sarasuti* v. *Mannu* (2) Pearson and Oldfield, JJ., held that the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras, are on the same level as to inheritance as the issue of a female slave by a Sudra, and that the illegitimate son of an *ahir* by a continuous concubine of the same caste took his father's estate in preference to the daughter of a legitimate son of his father who died in the father's life-time. In *Hargobind Kuari* v. *Dharam Singh* (3) Straight, O. C. J. and Duthoit, J., held that, according to Hindu law and usage, illegitimate sons are entitled to maintenance from their father, and his estate is liable for such payment. Hindu law differs from the English law in so far that it does not treat an illegitimate son as *filius nullius*. His status as a son in the family is recognised and his right to maintenance secured to him.

On the foregoing authorities, therefore, we think that it was rightly held in the Courts below that the plaintiff Ghansham Singh is entitled, in the absence of a legitimate son, to the occupancy holding of his father as a male lineal descendant. We therefore dismiss the appeal with costs.

Appeal dismissed.

(1) (1869) 13 Moo., I. A., 141. (2) (1879) I. L. R., 2 All., 134.
(3) (1884) I. L. R., 6 All., 329.

PRIVY COUNCIL.

P.C.
1908
June 16, 17, 23, *July* 27.

KALKA PRASAD AND OTHERS (PLAINTIFFS) *v.* MATHURA PRASAD AND ANOTHER (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow].

Evidence—Pedigrees—Proof of pedigree—Knowledge of names of ancestors from hearing them recited on ceremonial occasions—Pedigree made post litem motam—Controversy in different matter from that which if after suit would render statement inadmissible—Document made on particular occasion for specific purpose treated as declaration—Proof of heirship—Act No. I of 1872 *(Indian Evidence Act), section* 32, *clause* (5).

The plaintiffs sued to recover immovable property as next heirs, through their father, of one Gur Sahai. The principal defendant was the sister's son of Gur Sahai. On the plaintiffs' oral evidence and on certain pedigrees produced by them the Subordinate Judge was of opinion that Gur Sahai and the plaintiffs' father were descended from one common ancestor, from whom they were only seven degrees removed, and that their claim was proved. The defendant produced a pedigree which showed that Gur Sahai was descended from another ancestor than that stated in the plaintiffs' pedigrees and was in the 15th degree from a common ancestor, and the plaintiffs' father in the 16th degree, and he contended that under Hindu law heirship did no extend beyond the 14th degree, and that therefore he, though only a sister's son was to be preferred to such remote relations as heir. The judgment of the Court of the Judicial Commissioner on appeal, after a lengthy and adverse criticism of the plaintiffs' evidence concluded as follows :—" The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant" (defendant) " the plaintiffs are heirs of Gur Sahai, as according to it they are Samanodakas and therefore in the absence of other nearer heirs exclude the defendant, who is the son of Gur Sahai's sister."

Held that the above paragraph did not, under the circumstances and for the reasons stated by their Lordships of the Judicial Committee preclude the plaintiffs from endeavouring to sustain, on this appeal, the finding of the Subordinate Judge in their favour.

Held also that the pedigrees put in by the plaintiffs were not ancient family records handed down from generation to generation and added to as a member of the family died or was born ; but documents drawn up on particular occasions for a specific purpose by members of the family, and were accordingly to be treated as mere declarations made by the persons who respectively drew them up or adopted them.

One of the pedigrees dated in 1892 was held by the Court of the Judicial Commissioner to be inadmissible in evidence as having been made *post litem*

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motam, although the controversy which originated in 1891 did not relate to the heirship to Gur Sahai but referred to an entirely different matter.

Held it was wrongly rejected as evidence. To make a statement inadmissible on the ground that it was made *post litem motam* the same thing must be in controversy before and after the statement is made.

Freeman v. *Phillips* (1), *In re Shrewsbury Peerage* (2) and *Duke of Devonshire* v. *Neill* (3) followed.

The pedigree was admissible as a declaration made by a deceased member of a family touching the family reputation on the subject of its descent.

A pedigree, also rejected by the Judicial Commissioner's Court as inadmissible, was one signed by a deceased member of the plaintiffs' family, in the handwriting of such deceased member's son, and was stated to have been obtained from his father as a statement of the family descent for the purpose of being given in evidence in certain criminal proceedings.

Held that it had been adopted by such deceased member of the family, and not being shown to be *post litem motam* it was admissible in evidence.

APPEAL from judgments and decrees (18th September 1905 and 17th April 1906) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (16th December 1903) of the Subordinate Judge of Unao, who had decreed the appellants' suit.

The principal question on this appeal was whether the appellants were the next heirs to one Gur Sahai who was the owner (amongst other properties) of the village of Somb, the village of Shakpur, and a 5 biswa share in the village of Rampur Asnu.

The facts of the litigation are sufficiently stated in their Lordships' judgment.

The appellants (Kalka Prasad, Durga Prasad, and Sundar Lal) were the sons of one Sheo Sahai, who, on the death in 1896 of Parbati Kunwar the widow of Gur Sahai, the last male owner

(1) (1816) 4 M. & S., 486 (494, 497). (2) (1857) 7 H. L. C. 1 (22 .
(3) (1877) 2 Ir. L. R., 132.

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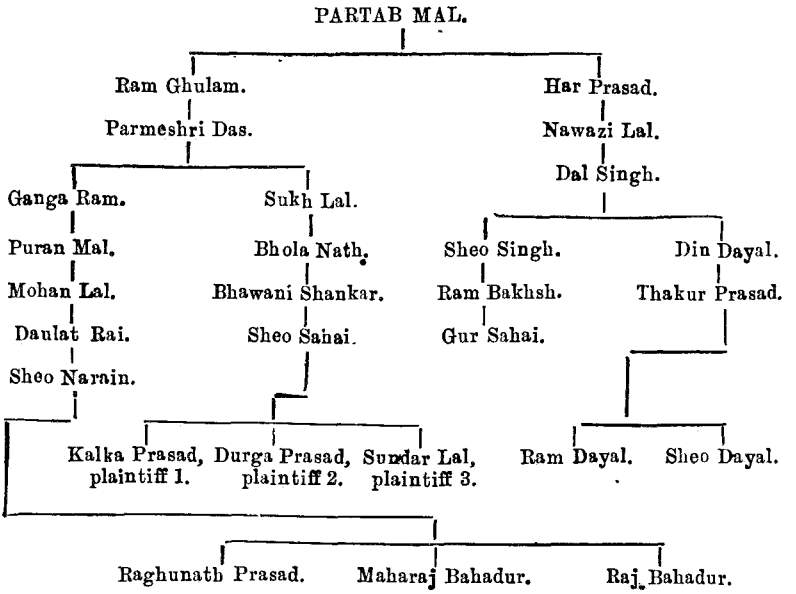
put forward a claim to succeed to his estate as the next reversionary heirs on the basis of the following pedigree :—



The Revenue Courts, however, made an order on 23rd April 1897 for mutation of names in favour of Mathura Prasad the first respondent who claimed title as sister's son of Gur Sahai.

The suit out of which this appeal arose was brought on 20th May 1901 by the appellants against Mathura Prasad and Chaudhri Nazrat Ali a transferee of part of the estate to recover the property belonging to Gur Sahai.

The Subordinate Judge on a consideration of the evidence oral and documentary found that the pedigree produced by the plaintiffs was proved and made a decree in their favour. He concluded his judgment as follows :—

"It is made clear that in the line of Partab Mal, Sheo Sahai and Gur Sahai were removed from him by 7 degrees ; and that at the death of Musammat Parbati, there was no heir living who was nearer than Sheo Sahai. The plaintiffs claim in the capacity of *Sapindas*, and the same has also been proved. A question was also raised to the effect, as to how many degrees are given to *Samandokas*. The learned counsel for plaintiffs contends that even after 14 degrees, the surviving members of family will be treated as *Samandokas*. It is not necessary now to go into this question. The principle involved in this question is that up to the 7th degree, the heirs are treated as *Sapindas*, and up to 14th, as *Samandokas*. . . . . Again, I have also shown above that not only on the present occasion

it has been proved that Sheo Sahai belongs to the line of Partab Mal and figures in the 7th degree, but on previous occasions also, whenever any pedigree was filed, he was shown in the same line and in same degree, particularly in the pedigrees of 1889 and 1892, which were filed before the litigation about the proprietary right arose. Thus finally I hold that the pedigree is correct, and that Sheo Sahai is the near heir to Gur Sahai. . . . . A strange feature of this case is that, leaving Sheo Sahai aside, the other persons who filed pedigrees, as mentioned above, also entered Sheo Sahai's name in the line of Partab Mal at No. 7. Hence it is that the pedigrees filed by other suitors subsequently to the arising of litigation about proprietary right, bear out the statement of plaintiffs (which has also been proved by other evidence) and should be treated as very strong corroborative evidence. The defendants totally failed to rebut this evidence. Plaintiff himself came into the witness-box, and first of all stated the pedigree. He made a mistake in giving the parentage of one person, but immediately corrected the mistake on further consideration. So in my opinion this fact does not detract anything from his evidence."

On appeal by the defendants, the Court of the Judicial Commissioner (R. SCOTT and A. E. RYVES) on 18th September 1905 were of opinion that the pedigree put forward by the plaintiffs was not proved, but that on a pedigree produced by the defendant Mathura Prasad the plaintiffs were entitled to succeed to a $\frac{1}{5}$th share of the estate, the remaining $\frac{4}{5}$th vesting in Gur Prasad, Sita Ram, Ram Sahai and Manohar Lal. They therefore varied the decree of the Subordinate Judge and gave the plaintiffs a $\frac{1}{5}$th share in the estate of Gur Sahai with mesne profits and costs in proportion.

After shortly stating the facts and setting out the pedigree as above, the appellate Court said :—

"The defence of the defendants" (Mathura Prasad and Chaudhri Nasrat Ali) "was the same. They denied the pedigree filed by the plaintiffs and Mathura Prasad filed one, according to which he admitted that Gur Sahai was the grandson of Dal Singh, and that Sheo Sahai was fifth in direct descent from Ram Ghulam. He alleged that Dal Singh was eleventh in descent from Partab Mal and that Ram Ghulam was tenth in descent from Shiam Das, and pleaded that he had been adopted by Gur Sahai, who made an oral will in his favour, and that in the absence of any near relative of Gur Sahai, he was entitled to succeed to the property as the son of Gur Sahai's sister. The pedigree filed by the defendant shows that of the relatives of the common ancestor of Gur Sahai and Sheo Sahai; Sheo Sahai, Gur Prasad, Sita Ram, Ram Sahai and Manohar Lal were sixteenth in descent from the common ancestor, Chajmal Das, and were alive at the death of Musammat Parbati. The Subordinate Judge found that Gur Sahai was seventh in descent from Partab Mal, through his son, Shiam Das, and that Sheo Sahai

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was a descendant of Partab Mal in the same degree through another son, Ram Ghulam.

"In appeal this finding was challenged, the learned advocate for the defendants contending that the plaintiffs had failed to prove the pedigree on which they relied, and that all the documentary evidence on which the lower Court based its finding was inadmissible, while the oral evidence was false.

"The Subordinate Judge based his finding that the pedigree relied on by the plaintiffs was proved on the oral evidence and the following documents :—

1 *and* 2 *Exhibits Nos.* 40 *and* 41.—Pedigrees filed by Shankar Sahai and Madho Ram in suits for pre-emption.

3. *Exhibit No.* 8.—The judgment in a pre-emption suit by Shankar Sahai against Fazl Husain, decided in 1889.

4 *and* 5. *Exhibits Nos.* 6 *and* 7.—Depositions of Gaya Prasad and Sheo Narain in the same suit.

6. *Exhibit No.* 9.—Pedigree filed by Sheo Sahai in 1892.

7. *Exhibit No.* 10.—A pedigree filed by Sheo Sahai in a suit instituted by the son of the second defendant against the first defendant in 1898.

8 *and* 9. *Exhibits Nos.* 14 *and* 15.—Copies of the settlement khewat and of a khewat attested by Rai Hazari Lal.

10. *Exhibit No.* 5.—A pedigree which purports to have been written by Maharaj Bahadur in 1872 and to have been given to the plaintiff Kalka Prasad by Sheo Narain in 1894, 1897, or 1898 for the purpose of a criminal charge.

"As Shankar Sahai and Madho Ram are admittedly alive the pedigrees filed by them were clearly inadmissible in evidence, and we have not been shown how the judgment in the suit of Shankar Sahai against Fazal Husain is admissible. In the deposition of Gaya Prasad he stated that Sundar Das was the ancestor of Sheo Narain, and thus contradicted the plaintiffs' pedigree, which shows that Sheo Narain was a descendant of Shiam Das the brother of Sundar Das. There is however nothing to show that Gaya Prasad was a member of the family or had any special means of knowledge, and his deposition should not have been admitted in evidence.

"Sheo Narain deposed that he was a descendant of Partab Mal, and his deposition was admissible as evidence of this. The rest of his statement referred to the persons who held shares in a sarai at Sandila which he said Sundar Das had founded. This part of the statement was relied on to prove that those who owned the shares are descendants of Sundar Das. That Sundar Das founded the Sarai which bears his name is probable, but the statement of Sheo Narain to that effect was hearsay and not admissible in evidence.

"The pedigree filed by Sheo Sahai in 1898 is also inadmissible in evidence, as Parbati Kunwar died two years previously, and the dispute regarding the succession to the property of Gur Sahai had then arisen.

"The copies of the Settlement Khewat and the Khewat attested by Rai Hazari Lal merely show in what shares some property was then held, and

are no evidence of the relationship of the persons who held them or of their relationship to Partab Mal or Chajmal Das. The pedigree which purports to have been written in 1872 by Maharaj Bahadur is said to have been given to Kalka Prasad by Sheo Narain for the purpose of a criminal case, but Maharaj Bahadur is still alive, and there is no evidence that Sheo Narain dictated it. Moreover, the evidence as to its being given to Kalka Prasad is unsatisfactory. He deposed that when he was 13 or 14 years of age his father dictated the pedigree of the family to him, and that he wrote it out and made 10 or 20 copies of it, so that he had learned it by heart 9 or 10 years ago. As he had either the original or copies of it then in his possession, there was no necessity for his obtaining a pedigree of the family for the purpose of the criminal case.

"So far, therefore, as the documentary evidence is concerned, there remains only the pedigree filed by Sheo Sahai prior to the death of Parbati Kunwar. He was a writer in the office of the Tahsildar, and probably foresaw that there would be a dispute about the succession to Gur Sahai's estate on Musammat Parbati's death, and it is not impossible that he was preparing for it, and in my opinion, no great value can be attached to the pedigrees which he filed. None of them was of an earlier date than 1889.

"When Sundar Lal, one of the plaintiffs, made a charge of waste against Musammat Parbati, she denied that he had anything to do with her property and said that he had made the application with the object of establishing a claim to it. This was in 1891, and the question of succession had therefore, arisen at that time, so that the pedigree filed by Sheo Sahai in 1892 would not be admissible in evidence. In one part of the judgment of the lower Court, the Subordinate Judge observed that the statement of Musammat Parbati was not proved, but Sundar Lal, in his evidence, admitted that she made it, although not in his presence. Further on in the judgment it is said that, even if it were proved, it would not affect the present case, because the son of the second defendant had recognized Sheo Sahai as the heir of Gur Sahai. It has been argued for the plaintiffs that the second defendant is bound by a statement or admission of his son in a former case, but it is needless to observe that no authority for such a contention was cited.

"The principal witness for the plaintiffs was Kalka Prasad, the eldest son of Sheo Sahai, to whose evidence I have already referred. He recited in Court a long and complicated pedigree, which he said had been dictated to him by his father. In it he gave not only his ancestors up to Mohan Das, the father of Chajmal Das, but also a large number of collaterals. As he was in Court at the hearing of the appeal, we tested his memory by asking him who was the father of Jaijai Ram, shown in the pedigree as the son of Durga Prasad, and the father of Raghubar and Manohar, and his first reply was Sidh Gopal. Afterwards he said that Jaijai Ram's father was Durga Prasad. He also said that Makhan Lal was the brother of Jaijai Ram, whereas in the pedigree he recited Makhan Lal appears as the son of Sabsukh Rai. I think this clearly shows that he had learned the pedigree by rote before he was examined as a witness and has forgotten it since. It is reasonable to suppose that a person may remember the names of his ancestors, which are recited at

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domestic ceremonies, but it is suspicious when he professes to remember the names of collaterals also, in such an elaborate family pedigree. Personally, I think it is exceptional to find a person who is aware of, or can repeat from memory, the names of his ancestors in the sixth and seventh degrees, and of the descendants of those ancestors. The pedigree which Kalka Prasad deposed that he made from his father's dictation has not been produced, nor was any of the numerous copies of it which he said he had made. At first he deposed that none of these copies was in existence, but afterwards said that he could produce one of them if required to do so. The learned Subordinate Judge's only reason for believing this witness and other persons who were examined to prove the pedigree relied on by the plaintiffs appears to be that they are members of the family and are therefore likely to know the names of their ancestors. It might have occurred to him that such persons may have motives for giving false evidence, specially as two of them are plaintiffs in the suit. I do not believe in the evidence of Kalka Prasad.

"The evidence of Raghunath Prasad as to the finding of a pedigree, produced by him, among some waste papers, has been referred to. Like most of the evidence, his deposition has not been very intelligently recorded. He said that he remembers the names of the members of the family because he heard them at marriages and also learned them from his grandfather Daulat Ram, who was reading them to a Pandit from a paper, but he could not say what names were then mentioned, and no such paper has been produced. He said he remembered the pedigree which he 'recited and also read out' to the Court, but what document he read from in doing so is not stated. If he recited and read from the pedigree found with the waste papers there was no necessity for the Subordinate Judge to record it on a separate piece of paper, which apparently he did. Although the pedigree which he produced was first stated to have been found among waste papers he afterwards, according to the evidence, said that his father had it, and again that he found it after his father's death and only a few days before he filed his written statement in the case. It is most improbable that he did not know he was to be examined until a few days before he was called, and I do not think any weight can be attached to his evidence. As in the case of Kalka Prasad he probably committed to memory, a short time before his deposition was recorded, the pedigree which he recited.

"Ulfat Rai, the third of the plaintiff's witnesses, is not a member of the family, but is the brother of Gur Sahai's wife, and as he did not know the pedigree of Gur Sahai or Sheo Sahai, the object of examining him is not apparent.

"Gur Prasad is the son of Sheo Sahai's sister, and the pedigree, so far as he deposed to it, is admitted. Mohabbat Rai's mother was a member of the family, and he recited a pedigree which he said he had learned from her brother when he was 13 or 14 years old. He was 77 when he was examined, and as he admitted that he did not know the descendants of his own great-great-grand father without consulting a pedigree, and does not remember the years in which his own children were born, I do not believe his statement that he remembers the pedigree of his mother's family, which he could have

had no object in committing to memory, more than 30 years after he heard it.

"Dayal Shankar is the brother-in-law of Gur Prasad and says that he never saw a pedigree of the family, but learned the relationship of the parties which he deposed to from his father, who was not of the plaintiffs' family, but married a lady who did belong to it. As his father was not a member of the family, and is not proved to have had any special means of knowledge, evidence of statements made by him as to the relationship of Gur Sahai and Sheo Sahai, is inadmissible. The witness was contradicted by Hazari Lal, who deposed that he had shown a pedigree of the family to him. Gur Sahai was the father-in-law of Hazari Lal's brother, and Hazari Lal admitted that he did not know the relationship of the parties until he saw a pedigree after the suit was instituted.

"Sundar Lal, the last witness, and one of the plaintiffs, is a petition-writer, and therefore a person not likely to be believed by any one acquainted with the reputation which practically all men of his profession bear in this country. He first recited a pedigree of the family which did not correspond to that in the plaint, and when he discovered that he had made a mistake, recited a different one. Both were stated to have been in accordance with one dictated by his father, Sheo Sahai, and so far as he knew there was no written pedigree of the family until he wrote one, which was dictated by his father, to be filed in the pre-emption suit (in 1889). He afterwards appears to have said that he had seen no written pedigree until his brother brought one from Sheo Narain for the criminal case. If he did say this, he contradicted himself, and, as he must have known, if his brother had written a pedigree of the family and made numerous copies of it, he contradicts Kalka Prasad's evidence also. As he was a plaintiff, it is improbable that he did not know previously that he would be called as a witness. I do not believe his evidence.

"The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the defendant, Mathura Prasad, the plaintiffs are heirs of Gur Sahai, as, according to it, they are *Samanodakas*, and therefore in the absence of other nearer heirs exclude the defendant, who is the son of Gur Sahai's sister."

After citing authorities on Hindu law on the subject the Court found that—

"According to the pedigree admitted by the defendant, Sheo Sahai was a *Samanodaka* of Gur Sahai, although he is 16th in descent from the common ancestor Chajmal Das, and Gur Sahai was 15th in descent from him.

But Gur Prasad, Sita Ram, Ram Sahai, and Manohar Lal were also alive on the death of Parbati Kunwar and were related to Gur Sahai in the same degree as Sheo Sahai. All these, therefore, were entitled to a $\frac{1}{5th}$ share in the property in suit."

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On 16th March 1906 the Court of the Judicial Commissioner granted the plaintiffs leave to appeal to His Majesty in Council.

The defendants Mathura Prasad and Chaudhri Nasrat Ali on 16th December 1905 had applied to the Court of the Judicial Commissioner for review of its judgment, dated 18th September 1905, and on 17th April 1906 that Court (R. SCOTT and W. F. WELLS) cancelling the judgment and decree made on 18th September 1905, and holding that Sheo Sahai, the plaintiffs' father, being 16th in descent from the common ancestor Chajmal Das, according to the pedigree admitted by the defendant Mathura Prasad, was not a *Samanodaka* of Gur Sahai and was not entitled to succeed to his property.

In lieu, therefore, of the decree passed on 18th September 1905, the appeal was allowed, and the suit dismissed with costs.

On this appeal

De Gruyther, K. C., and *S. A. Kyffin* for the appellants contended that, on the death of Parbati Kunwar, Sheo Sahai the father of the appellants was the next reversionary heir to the estate of Gur Sahai, and in any case was a nearer heir than the defendant Mathura Prasad. As to the principles of Hindu law on which succession depended reference was made to Mayne's Hindu law, 7th edition, p. 679, para. 501. It was contended that the pedigrees on which the appellants relied were sufficiently proved for the reasons given by the Subordinate Judge. There was nothing unusual in a boy being able to repeat the names of his ancestors from having heard them recited on ceremonial occasions as the appellant Kalka Prasad had done; and the case of *Debi Pershad Chowdhry* v. *Radha Chowdhrain* (1), where such evidence was held to be admissible in support of a pedigree, was referred to. The Evidence Act (I of 1872), sections 11, 32, clause (5), and 50 were cited. The appellants' pedigrees were corroborated by their oral evidence, and on the other hand no proof was given of that put forward by the defendants. It was submitted that the appellants were not precluded by what took place before the Judicial Commissioners from now supporting the findings of the Subordinate Judge that they were the preferable heirs of Gur Sahai.

(1) (1904) I. L. R., 32 Calc., 84.

Ross for the 1st and 2nd respondents contended that after what had taken place at the hearing before the appellate Court in India, and the observations of the Judicial Commissioners on the appellants' evidence, they were estopped from raising on this appeal the contention that they were the exclusive heirs of Gur Sahai. It was submitted that the pedigrees were rightly held to be inadmissible in evidence as not coming within clause (5) of section 32 of the Evidence Act (I of 1872). It was most improbable that in 1872 Maharaj Bahadur was old enough to write out the pedigree of that date, and he had not been called as a witness in the case. Both on the evidence and as a matter of law the appellants had failed to prove their title to the property sued for and their suit had been rightly dismissed by the decision under appeal, which should be upheld.

De Gruyther, K. C., replied.

1908, *July 27th.*—The judgment of their Lordships was delivered by LORD ATKINSON :—

The suit out of which this appeal arises was instituted by the appellants, who are the three sons of one Sheo Sahai, deceased, claiming through their father as heirs of one Gur Sahai, deceased, to recover possession of the immovable property in the plaint described, of which Gur Sahai died possessed about 40 years ago.

Gur Sahai was succeeded in the possession and enjoyment of the property by his widow, Musammat Parbati, who died on the 22nd March 1896. Sheo Sahai died on the 22nd September 1899.

The principal defendant, the respondent Mathura Prasad, is the nephew of Gur Sahai, his sister's son. He took possession of the property on the death of Musammat Parbati, still retains it, and succeeded in obtaining mutation of names in his own favour.

Only two questions were discussed on the hearing of the appeal, and it is only necessary for its decision that their Lordships should deal with these. They are :—

1. Is it open to the plaintiffs, owing to what took place at the first hearing before the Court of the Judicial Commissioner, to attempt to establish that they are, according to Hindu Law, the heirs of Gur Sahai ?

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2. If it be open to them to do so, is the evidence, legally and properly admissible, given before the Subordinate Judge, who tried the case in the first instance, sufficient to establish the fact of their alleged heirship ?

The course the proceedings took before the Court of the Judicial Commissioner is somewhat peculiar. The plaintiffs had, at the hearing, examined several witnesses and given in evidence several pedigrees, which, in the opinion of the Subordinate Judge, proved that Gur Sahai and Sheo Sahai were descended from one common ancestor, Partab Mal, son of Chajmal Das, were only seven degrees removed from that ancestor, and that the plaintiffs were, through Sheo Sahai, heirs of Gur Sahai. Mathura Prasad filed a pedigree which showed that Gur Sahai was not descended from Partab Mal at all, but from another son of Chajmal Das, a younger brother of Partab Mal, named Shiam Das, that Gur Sahai stood in the 15th degree from the common ancestor, Chajmal Das, and Sheo Sahai in the 16th degree; and he contended that, under the Hindu law, heirships did not extend beyond the 14th degree, and that therefore he (Mathura Prasad), though only a sister's son, was to be preferred as heir to such remote relations.

No evidence whatever was given to prove the latter pedigree. Indeed it was abandoned by the respondents on this appeal. Yet the Court of the Judicial Commissioner, finding that it showed that five other persons stood in the same degree of relationship to Chajmal Das as did Sheo Sahai, held that the Hindu law permitted them, notwithstanding this, to succeed as heirs to Gur Sahai, and gave a decree for possession of one-fifth (not one-sixth as it should have been) of the land, the recovery of which was sought, as the share of Sheo Sahai therein.

Thereupon the defendants Nos. 1 and 2 applied under section 623 of the Civil Procedure Code for a review of this judgment, setting forth amongst other things:—

1. That the Court had held that the pedigrees set up by the plaintiffs were not proved, and that they were therefore not exclusively entitled to the property in suit.

2. That the question whether persons in the 16th degree could be preferred to Mathura Prasad, the nephew, was not allowed by the Court to be fully argued.

On this application the Court of the Judicial Commissioner decided that the Hindu law forbade what they had previously decided it permitted, namely, the succession of a person sixteenth in descent from a common ancestor, on the ground that he could scarcely be said to be a relation at all, and that therefore the nephew Mathura Prasad should be considered as nearer heir to Gur Sahai than Sheo Sahai. They accordingly dismissed the plaintiffs' suit with costs. It is to be observed, however, that the Court, in deciding on this application, made no reference to the first point which they had decided, *viz.*, that the pedigree set up by the plaintiffs was not proved.

In the first judgment of the Court they state that the finding of the Subordinate Judge that both Gur Sahai and Sheo Sahai were seventh in descent from Partab Mal had been challenged by the defendants' advocate, who contended that the plaintiffs had failed to prove the pedigree on which they relied, and that all the documentary evidence on which the Lower Court based its finding was inadmissible. They then proceeded to devote four pages of their judgment to a minute and critical examination of the evidence, written and oral, adduced by the plaintiffs, giving their reasons for holding that the documents were inadmissible, and the witnesses unworthy of belief, and they wind up this examination with the passage on which the respondents rely as sufficient to shut out the plaintiffs from attempting to sustain the decision of the Subordinate Judge. It runs as follows:—

"The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant, Mathura Prasad, the plaintiffs are heirs of Gur Sahai, as according to it they are *Samanodakas*; and therefore in the absence of other nearer heirs exclude the defendant, who is the son of Gur Sahai's sister."

It is inconceivable why the evidence given before the Subordinate Judge should be thus elaborately reviewed, if the plaintiffs' advocate had formally admitted he could not support that Judge's finding. It is almost as strange that this advocate should confine himself to a contention based on a pedigree proved by nobody, and binding on nobody but the person who filed it, and which, at the best, could only secure to his clients one-sixth of what they sought

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to recover. It is not less peculiar that the contention which is stated to have been the only contention put forward by the plaintiffs, is the very contention which was conducted in such a fashion that a review was successfully applied for. Having regard to these several matters, it appears to their Lordships impossible to hold that the plaintiffs are by the statement contained in this paragraph estopped from endeavouring to sustain, on this appeal, the finding of the Subordinate Judge on this point. The second question, therefore, alone remains for decision.

The plaintiffs gave in evidence at the trial three pedigrees, amongst others, namely (1) a pedigree purporting to have been written by one Maharaj Bahadur in 1872; (2) a pedigree purporting to have been filed by Sheo Sahai in 1892 or 1894 in a civil suit concerning lands other than and different from the lands sued for in this action, in which Sheo Sahai was plaintiff and Kesho and others defendants; (3) a pedigree filed in a suit brought for the recovery of the possession of certain lands in which Shankar Sahai (the son of the second defendant) was plaintiff, and Fazal Husain and others were defendants. The Subordinate Judge, though he held—quite rightly, in their Lordships' opinion—that the controversy out of which this appeal has arisen is but a stage in the dispute which arose on the death of Musammat Parbati in 1896, admitted each of these pedigrees in evidence, and the plaintiffs relied strongly upon them. They are not ancient family records handed down from generation and to generation and added to, as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them. Taking them in the reverse order, the last is inadmissible, having been made *post litem motam*. The second is endorsed: "(Signed) Sheo Sahai, plaintiff, by the pen of Sundar Lal, Special Agent," and is on the evidence of Sundar Lal clearly admissible as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent. It was held by the Court of the Judicial Commissioner not to be admissible on the same ground as the third pedigree because, in a statement made by Musammat

Parbati in the absence of Sundar Lal, in a suit instituted by him against her in the year 1891 for cutting down trees in a certain grove in the village of Rampur Ansu, which he alleged was a halting-place, she had said :—"I have no kinship with him, nor am I on visiting and dining terms with him as a fellow-caste man. He has no concern with my proprietary interest *(hakkiat)* . . . The plaintiff's [Sundar Lal's] father, and his co-sharers have wasted their shares in the *hakkiat.*" But it is clear that the controversy to which this statement refers was not a controversy as to the heirship to Gur Sahai, but referred to an entirely different matter. In order to make the statement in admissible on this ground, the same thing must be in controversy before and after the statement is made—*Freeman* v. *Phillips*, (1); *Shrewsbury Peerage*, (2); *Duke of Devonshire* v. *Neill* (3). In their Lordships' opinion, having regard to the evidence of Sundar Lal and of the other witnesses examined for the plaintiffs, this pedigree was clearly admissible.

The first pedigree purports to be signed by Maharaj Bahadur, a son of Sheo Narain, a deceased member of the plaintiffs' family, who was however not examined as a witness. According to the evidence of Kalka Prasad, it was in the handwriting of the former and was obtained by him from Sheo Narain in the years 1894—1896 (the precise date is not fixed) as a statement of the family descent, for the purpose of being given in evidence in certain criminal proceedings instituted under section 323 of the Indian Penal Code in the case of *In re Baiju and others* v. *Sundar Lal and Durga Prasad*. It was thus adopted by Sheo Narain, is not shown to have been made *post litem motam*, and is therefore, in their Lordships' opinion, admissible.

These pedigrees disclose that Gur Sahai and Sheo Sahai are descended from a common ancestor, Partab Mal, one of the sons of Chajmal Das, the first through his son Har Prasad, the second through his son Ram Ghulam, each being six degrees removed from Partab Mal. Six of the many witnesses examined on behalf of the plaintiffs, members of the family, prove descent from this common ancestor. Three of these, namely,

(1) (1816) 4 M. & S., 486 (494, 497). (2) (1857) 7 H. L. C., 1 (22).
(3) (1877) 2 Ir. L. R., 132.

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Kalka Prasad, Mohabbat Rai, and Sundar Lal, prove pedigrees, substantially identical with that signed by Sheo Sahai filed in 1892 or 1894, and others, such as Hazari Lal, prove important portions of it; while Lalta Prasad, one of the defendant's witnesses, deposed as follows:—

"Sheo Sahai also belongs to the family of Gur Sahai. I have heard that he is also remote by six degrees. In my opinion both [*i.e.*, Madho Ram and Sheo Sahai] are equally related, *i.e.*, in the same degree."

And Sri Kishen, another witness for the defendants, a priest of the family of Sita Ram deposed:—

"Sheo Sahai and Sheo Narain descend from Ram Ghulam. Gur Sahai descends from Har Prasad. Ram Ghulam, Har Prasad and Shiam Das are sons of Partab Mal."

This evidence precisely accords with the above-mentioned pedigrees numbered 1 and 2; proves, in fact, some of the most important steps in them, and is, therefore, the strongest corroboration of them.

Further corroboration of these pedigrees is to be found in the mode in which a certain Mohalla Sarai has been enjoyed. The family reputation is that this Sarai was founded by Sundar Das (one of the brothers of Partab Mal), who died childless. If the pedigrees of 1872 and 1894 be correct, then half, or an 8-anna share in this Sarai, should be found in the enjoyment of the descendants of Partab Mal, and the remaining 8-anna share in the enjoyment of the descendants of Shiam Das, the only brother of Partab Mal who had descendants. That, according to the evidence of Raghunath Prasad and Kalka Prasad, is precisely what is found. Two-anna shares were enjoyed by Sheo Sahai, Sheo Narain, and Gur Sahai respectively; a 2-anna share by Sheo Dayal and Ram Dayal (who died childless) jointly, and the remaining 8 annas by Sita Ram, Gur Prasad, Ram Narain, Shankar Sahai, and other descendants of Shiam Das. The Subordinate Judge points out that had Sheo Sahai and Sheo Narain been descended, as was contended for by the defendants, from Shiam Das and not from Partab Mal, the whole 8 anna share of Partab Mal must, in the events which have happened, have come to Musammat Parbati. Sita Ram, one of the defendants, gives in detail the distribution of an 8-anna share in the Sarai coming into the hands of his branch of the family, and states

that the Sarai is joint property. No evidence is given to contradict that of Raghunath Prasad and Kalka Prasad as to the persons amongst whom the share of Partab Mal in the Sarai is distributed.

It was argued by Mr. Ross, on behalf of the defendants, that the fair conclusion to be drawn from the evidence was that Maharaj Bahadur was either not born in 1872, or was then of such tender years that he could not have drawn up the first pedigree, as deposed to by Kalka Prasad. No doubt there is much force in this argument, but, even if it prevailed, there remains the second pedigree, that of 1892, corroborated as it has been in the manner pointed out.

Their Lordships think that it is impossible to put aside all this evidence, as was done by the Court of the Judicial Commissioner. They are, therefore, of opinion that the conclusion at which the Subordinate Judge arrived is that to which the evidence properly admissible, on the whole, most reasonably leads, and that the decision of the former tribunal was erroneous and that its decrees should therefore be reversed with costs, and this appeal allowed. They will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants:—*Young, Jackson, Beard and King.*

Solicitors for the 1st and 2nd respondents:—*T. L. Wilson & Co.*

J. V. W.

GAYA PRASAD (PLAINTIFF) *v.* BHAGAT SINGH (DEFENDANT.)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

P. C.
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June 17,
July 31.

Malicious prosecution—Information given to police—Prosecution by police after investigation—Acquittal of accused—Liability of informant where information is found to be false—"Prosecutor" in criminal case—Malice—Criminal Procedure Code, section 495.

It is not a principle of universal application that if the police or Magistrate act on information given by a private individual without a formal complaint or application for process the Crown and not the individual becomes the prosecutor.

Present:—Lord ROBERTSON, Lord ATKINSON, Lord COLLINS, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

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Narasinga Row v. *Muthaya Pillai* (1) distinguished.

The answer to the question who is the "prosecutor" must depend upon the whole circumstances of the case. The mere setting the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted by the police; that is again a question of fact. Theoretically all prosecutions are conducted, in the name and in behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who, *pro hac vice*, represents the Crown. In India under section 495 of the Criminal Procedure Code (Act V of 1898) a private person may be allowed to conduct a prosecution, and "any person conducting it may do so personally or by pleader"; and where it is permitted this is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives.

The foundation of the action for malicious prosecution is malice, which may be shown at any time in the course of the inquiry.

Fitzjohn v. *Mackinder* (2) referred to.

Where the defendants, though their names did not appear on the face of the proceedings, except as witnesses, were directly responsible for a charge of rioting being made against the plaintiff, had produced false witnesses to support the charge at the investigation by the police; had taken the principal part in the conduct of the case before the police and in the Magistrate's Court; had instructed the counsel who appeared for the prosecution at the trial that the plaintiff "had joined the riot," and had done all they could to procure the conviction of the plaintiff, who was acquitted, being found not to have been present at the rioting.

Held that they were rightly found liable for damages in an action for malicious prosecution.

APPEAL from a decree (14th December 1905) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (31st July 1905) of the Subordinate Judge of Bahraich, who had decreed the appellant's suit.

The principal question for determination in this appeal was whether on the facts found, the respondents were liable in law to an action for damages for malicious prosecution.

The facts were as follows:—Between the two villages of Shukulpurwa in the Kapurthala estate and Keora in the Rampur Mathura estate the river Ghoora flowed. The respondent Sardar Bhagat Singh was the munsarim, and the respondent Imam-ud-din Shah was the kanungo of the Boundi division of the Kapurthala estate in which the village of Shukulpurwa was

(1) (1902) I. L. R., 26 Mad., 362.

(2) (1861) 9 C. B. N. S., 505 (522, 531).

situate. The appellant in 1902 was naib or manager of the Rampur Mathura estate.

On 28th October 1902 Imam-ud-din Shah reported to the Inspector of Police at Boundi that on that day 700 or 800 men of the Rampur Mathura estate had entered the village of Shukulpurwa, cut and carried away the crops on certain lands, and stolen other crops and property belonging to the tenants.

On 29th October the Inspector made an order for Bhagat Singh to inquire and report. On 30th October 1902 Bhagat Singh submitted a report upon which orders were passed that proceedings should be taken under section 145 of the Code of Criminal Procedure.

On 2nd November 1902 an application was made on behalf of the Kapurthala estate under section 107 of the Criminal Procedure Code to the Deputy Collector of Bahraich who sent the application for inquiry by the Inspector of Police at Fakhrpur. Certain persons who were named in the petition were charged, and the appellant's name was not mentioned. Before the police Bhagat Singh and Imam-ud-din conducted the prosecution. They then procured evidence that a riot was committed and that the appellant had personally taken part in the riot. By producing this evidence they induced the Inspector of Police to send the appellant and the other accused persons for trial before the Deputy Collector of Bahraich. The prosecution was conducted by a barrister instructed by Bhagat Singh and Imam-ud-din Shah, and pressed under their instructions against the appellant. These proceedings came to an end by an order made by the Magistrate on 15th July 1903, acquitting the appellant and all the other accused persons, and expressing the opinion that the charges had been concocted by the respondents.

On the 14th July 1904 the appellant brought the suit out of which this appeal arose against Bhagat Singh and Imam-ud-din Shah claiming damages Rs. 7,000 from them for malicious prosecution.

The defence was that the defendants did not institute any criminal prosecution, but were merely witnesses for the prosecution; that as witnesses they were justified in making the

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statements they did in the Criminal Court, and no suit could legally be brought against them ; and that the prosecution was not malicious nor without reasonable and probable cu se, nor did it arise from any illegitimate motive.

The most material issue was the first "was any report made to the police, or any complaint lodged by the defendants against the plaintiff, and did the defendants or either of them prosecute him on the charge of riot?" Others raised the question of whether there was malice, or want of reasonable and probable cause.

On the evidence the Subordinate Judge held that there was no doubt as to the two defendants being the chief cause of the plaintiff's having been accused of rioting ; and although their names did not appear on the face of the criminal proceedings, yet they were in fact the prosecutors, and had concocted and fabricated false evidence to get the plaintiff charged with rioting; that there was no reasonable and probable cause for the prosecution and that the defendants had acted maliciously. A decree was accordingly made in favour of the plaintiff, for Rs. 6,082-8 and costs of the suit.

On appeal by the defendants to the Judicial Commissioner of Oudh that Court (W. F. WELLS, 2nd Additional Judicial Commissioner) held, on the authority of the cases of *Narasinga Row* v. *Muthaya Pillai* (1), and *Dudhnath Kandu* v. *Mathura Prasad* (2) that no one but a person who has made a formal complaint or application for process to a Court could be sued for damages for malicious prosecution, and in the result he dismissed the suit, but without costs. The material portion of his judgment was as follows :—

"It has been urged in this Court that the prosecution was a police prosecution, and that though the defendants may have been in Court assisting counsel, and though some of his fees may have been paid through them, yet the fees were paid actually by the estate and the defendants were merely acting under the instructions of the superior officers in the estate, which therefore, must be considered to be the real prosecutor.

"Now it is admitted that no formal complaint was made to a Court against the plaintiff, and it is alleged that he was sent for trial under section 147, Indian Penal Code, on information given to the police by the defendants, who produced evidence before the police and took an active part in the case by instructing Counsel in the Courts.

(1) (1902) I. L. R., 26 Mad, 362. (2) (1902) I. L. R. 24, All. 3

"The first question to the considered is, whether, if this allegation be true, the defendants are liable in this action.

"The learned counsel for the defendants has relied greatly on the case of *Narasinga Row* v. *Muthaya Pillai* (1), in which it was held that the only person who can be sued in an action for malicious prosecution is the person who prosecutes. The defendant in that case gave information to the police of an offence cognizable by them, and the police after investigation thought fit to prosecute and the plaintiff was acquitted. It was held that, though the defendant may have instituted the criminal proceedings before the police, he certainly did not prosecute the plaintiff and was not responsible for the act of the police. The learned Judges appear to have followed another unreported decision of the same Court. It does not appear from the decision reported if the defendant in that case brought witnesses before the police or if he afterwards took an active part in the conduct of the case.

"The learned counsel for the defendants has relied also on the case of *Rai Jang Bahadur* v. *Rai Gudor Sahai* (2). In that case the plaintiffs were said to have been prosecuted in the Criminal Courts in consequence of information given to the police. It does not appear definitely if the police sent the accused up for trial, but it is clear that in addition to the information given to the police a complaint was filed in the Criminal Courts by two of the defendants' servants, which did not occur in the present case; and this would have probably prevented the learned Judges adopting the view of the Madras High Court, even if the plaintiff was sent up to trial by the police. They held that the defendant having admittedly paid the costs of the prosecution, must be held liable; and the learned counsel for the defendants has therefore argued that the Maharaja of Kapurthala, and not his clients should be held liable. I should not however be disposed to accept this view in the present case, having regard to its peculiar circumstances, which differ entirely from those of *Rai Jang Bahadur* v. *Rai Gudor Sahai*.

"I was also referred to the case of *Dudhnath Kandu* v. *Mathura Prasad* (3). In that case the plaintiff was prosecuted by a Magistrate on information given by the defendant, who had, however, not mentioned him in the formal complaint. Here too, it does not appear what part the defendant took in the subsequent proceedings.

"In the case of *Musa Yakub Mody* v. *Manilal Ajitrai* (4), the defendant had started the prosecution by a complaint laid in court; proceedings were taken by Government for extradition, and the plea was set up that the defendant was not liable in respect of those proceedings because of the action of Government. This plea was overruled, as the defendant had actually conducted the case for extradition; and moreover he had clearly started the prosecution by a formal complaint. In that judgment there is a reference to the case of *Fitzjohn* v. *Mackinder* (5), in which it was held that a person was responsible for starting or continuing a prosecution even when he had been ordered by a Court to prosecute. But in that case the Court order was

(1) (1902) I. L. R., 26 Mad., 362.
(2) (1897) 1 C. W. N., 537.
(3) (1902) I. L. R., 24 All. 317.
(4) (1904) I. L. R., 29 Bom., 368.
(5) (1861) 9 C. B. N. S., 505 : 30 L. J. C. P. 156.

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the result of perjury on the part of the defendant himself. No authority has been quoted to me which really conflicts with the view taken by the Madras High Court, and the Allahabad decision to some extent supports their view.

"The principle followed appears to be this. If the police or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual. It may be said that if any person is aggrieved thereby, his remedy would lie in a prosecution under section 182 of the Penal Code, or for perjury, both of which would require sanction under section 195 of the Criminal Procedure Code, and so there can be no action against the individual for malicious prosecution. But a false charge made in a complaint would be punishable under section 211, Penal Code, and prosecution in respect of it would also require sanction under section 195, Criminal Procedure Code, yet it would undoubtedly afford a ground for an action for malicious prosecution. It is difficult to see why a person who has had to defend himself against a serious false charge which has been set on foot by another, should have a civil remedy when the charge is made in one way and not when the charge is made in another way. In a country where the police have a doubtful reputation, deserved or not, it seems unreasonable that a man should be able to secure himself against a civil action simply because his charge is supported by the *imprimatur* of a police officer, to whom he may have given a gratification. But although I entertain these doubts, I hesitate to differ from the views of several of the learned Judges of the Madras and Allahabad High Courts, who appear to hold that in order to afford ground for an action for malicious prosecution there must be some formal complaint or application for process to a Court.

"It is contended that the defendants adduced evidence before the police. But if the fact that the police took up the case affords any privilege to the defendants in respect of the information they gave, it would also, I think, protect them in the matter of the production of evidence. In the Madras case I can hardly doubt that the complainant gave assistance to the police in the matter of procuring evidence.

"It is further urged that the defendants having assisted counsel for the prosecution in Court makes them liable as prosecutors. But I am unable to accept this view. The case was one of considerable importance to the Kapurthala estate and the subordinate officials who were acquainted with the circumstances, would naturally be directed to look after the case, and see that what was necessary was elicited from the witnesses. If no liability attaches to the defendants from the information said to have been given to the police, I do not think any would, under the circumstances, attach from what they did subsequently in Court.

"Holding the view set forth above, I do not think it necessary to enter into details of the facts and determine whether or not the police acted on information given by the defendants and whether the charge of rioting was false or not.

"But I may say that having studied the documentary evidence to which my attention was drawn and read most of the voluminous oral evidence

recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under section 147, at the instigation of Bhagat Singh and not of his own motion; that the charge was found false by the Magistrate who tried the case; and that the evidence on the record produced by the defendants is not such as to incline me to believe it to have been proved. The evidence of Bhagat Singh was anything but straightforward.

"Under these circumstances, though I must allow the appeal on the legal grounds set forth above, I consider that the parties should pay their own costs."

From that decision special leave to appeal was granted to the appellant by two Judges of the Judicial Commissioner's Court (L. G. EVANS and E. CHAMIER) under section 595, clause (*c*) of the Civil Procedure Code, on the ground of the importance of the question of law raised, and on the ground that the question of law had been wrongly decided, and that the decision was opposed to the ruling of the Bombay High Court in *Musa Yakub Mody* v. *Manilal Ajitrai* (1).

On this appeal, which was heard *ex parte*, *De Gruyther, K. C.*, and *S. A. Kyffin* for the appellant contended that the finding of law by the appellate Court that no action would lie for damages for malicious prosecution against any person who has not made a formal complaint for process to a Court was erroneous. The Court came to that finding on the authority of the cases of *Narasinga Row* v. *Muthaya Pillai* (2); and *Dudhnath Kandu* v. *Mathura Prasad* (3), which he considered he was bound to follow, though his real opinion of the facts of the case (see the conclusion of his judgment) was substantially the same as that of the Subordinate Judge, who said that there was no doubt as to the two defendants being the chief cause of the appellant's having been accused of rioting, and that, although their names did not appear on the face of the proceedings, yet they were in fact the prosecutors and had concocted and fabricated false evidence to get the appellant charged with that offence. It was submitted that the liability of the defendants in each case should be determined on the facts. Where, as here, the defendants not only [illegible] false information to the police on which the charge under section 147 of the Penal Code was made against the appellant, but took an active part in the conduct of

(1) (1904) I. L. R., 29 Bom., 368. (2) (1902) I. L. R., 26 Mad., 362.
(3) (1861) 9 C. B. N. S., 505, 22.

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the proceedings in the courts and instructed counsel to press the charge against him, all the time knowing that the appellant was innocent, they should not be allowed to evade responsibility merely because they did not initiate the complaint in court. Reference was made to *Fitzjohn* v. *Mackinder* (1); Criminal Procedure Code (Act V of 1898), section 4 as to the definition of "cognizable offence," section 145 as to disputes likely to cause a breach of the peace, section 156 as to the investigation by police officers of a "cognizable offence," schedule II "offence under section 147 of the Penal Code (Act XLV of 1860)," section 190 as to "conditions requisite for initiation of proceedings," and section 495 as to "permission to conduct prosecution." The decision of the Subordinate Judge was correct and should be restored. The two Judges of the Judicial Commissioner's Court who granted special leave to appeal appear to have doubted the correctness of the judgment now under appeal.

1908, *July* 31*st*:—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE:—

This is an action for damages for malicious prosecution. The parties are officials of adjoining estates, the plaintiff being manager of the Rampur Mathura estate, and the defendants being respectively munsarim and kanungo of the Boundi division of the Kapurthala estate. The case arose out of a dispute regarding the ownership of some alluvial land lying between the two estates; and the charge was that the plaintiff had taken part in a riot connected with this dispute. The case was sent for trial on the 22nd November 1902, but was not disposed of until the 15th July 1903, when the Magistrate dismissed it, holding that "there was no riot at all," and adding:

> "I consider Kapurthala estate entirely to blame in this case, and hold that Sardar Bhagat Singh (assisted by Imam-ud-din Shah) is responsible for concocting up these riot and theft cases with all the minor complaints."

The plaintiff thereupon brought this action, claiming Rs. 7,000 damages. The Subordinate Judge held that "it was found during the trial of the criminal proceedings, and proved before me by the evidence in the case, that the two defendants have concocted and produced false evidence to get the plaintiff charged with the crime," and he gave the plaintiff a decree for

(1) (1861) 9 C. B., N. S., 505.

Rs. 6,082-8 damages and the costs of the suit. The Judicial Commissioner on appeal, on the authority of the case of *Narasinga Row* v. *Muthaya Pillai* (1) dismissed the suit, holding that "if the police or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual;" but he added:

"I may say that, having studied the documentary evidence to which my attention was drawn, and read most of the voluminous oral evidence recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under section 147 at the instigation of Bhagat Singh and not of his own motion; that the charge was found false by the Magistrate who tried the case; and that the evidence on the record produced by the appellants is not such as to incline me to believe it to have been proved."

It will be convenient to refer at once to the decision of the Madras High Court (*ubi supra*) which the learned Judicial Commissioner appears to have followed with some reluctance. The judgment is in these terms:—

"The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though the first defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The defendant is not responsible for their act, and no action lies against him for malicious prosecution."

The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified; but in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned

(1) (1902) I. L. R., 26 Mad., 362.

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witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the magistrate —it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—Who was the prosecutor ?—and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion ; the conduct of the complainant before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. In India a private person may be allowed to conduct a prosecution under section 495 of the Criminal Procedure Code, which provides that " any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police . . . . Any person conducting the prosecution may do so personally or by a pleader." When this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry. As Bramwell, B. observes in *Fitzjohn* v. *Mackinder* (1):—

"This action is not for damages in respect of the preferring of the indictment only, but also for the residue of the prosecution, and the damage consequent upon it. . . . Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it."

And in the same case, Cockburn, C.J., says (at p. 531):

"A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or, if spontaneously undertaken, from having been commenced under a *bonâ fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the

(1) (1861) 9 C. B., N. S., 505; at p. 522.

prosecution, with the intention of procuring *per nefas* a conviction of the accused."

Turning to the facts of the present case, it appears that on the 2nd November 1902 an application was made to the Deputy Collector of Bahraich for an investigation by the police of a charge of unlawful assembly against eight persons, of whom the plaintiff was not one. The investigation was entrusted to Izhar-ul-haq, a Sub-Inspector of Police, who says:

"I summoned the plaintiff because Bhagat Singh gave me a list of accused persons containing plaintiff's name. . . . When Bhagat Singh produced that list, I said to him that the complaint filed in Court did not contain Gaya Prasad's name. How was it that the defendant had mentioned his name . . ? And then Bhagat Singh [said] that the chief cause of riot was the plaintiff; so he gave the plaintiff's name in the list, and that he would be summoned."

This makes it clear that Bhagat Singh was directly responsible for any charge at all being made against the plaintiff. Imam-ud-din was the person who made the original report of an unlawful assembly, upon which the prosecution for riot was ultimately based, and the two men appear to have acted together throughout the subsequent proceedings. They took the principal part in the conduct of the case both before the police and in the Magistrate's Court, and the learned counsel who appeared for the prosecution at the trial before the Magistrate expressly says that they instructed him that Gaya Prasad "joined the riot." As already mentioned, the Magistrate found that there was no riot at all, and that on the day on which it was alleged to have occurred, the appellant was ill at Lucknow. The charge was a false one to the knowledge of the respondents, and they must abide the consequences of their misconduct.

In granting leave to appeal to his Majesty in Council, the learned Judicial Commissioners say:

"It is difficult to overestimate the importance of the question raised in this case, namely, whether a person may be sued for damages for malicious prosecution who makes a false report which results in a prosecution, or who instigates the police to send persons up for trial under section 170 of the Code of Criminal Procedure, or who conducts the case against those persons when sent up for trial."

And they add:

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GAYA PRASAD v. BHAGAT SINGH.

"All these are circumstances which occur perhaps daily in every district in India, and having regard to the immense number of false charges made, (we) think it most desirable that there should be no doubt as to the law on the subject."

In the opinion of their Lordships, it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges, and they will humbly advise His Majesty that the appeal ought to be allowed and the decree of the Judicial Commissioner set aside, with costs, and that of the Subordinate Judge confirmed. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant:—*Sanderson, Adkin, Lee and Eddis.*

J. V. W.

1908
June 5.

APPELLATE CIVIL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

JUMAI KANJAR (DECREE-HOLDER) *v.* ABDUL KARIM KHAN (JUDGMENT-DEBTOR).*

Execution of decree—Limitation—Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 179 (5)—*Civil Procedure Code, section* 248—*Date of issuing notice.*

Held that the expression "the date of issuing notice under the Code of Civil Procedure, section 248," as used in article 179 (5) of the second schedule to the Indian Limitation Act, 1877, means the date upon which the Court passes an order for issue of a notice under section 248, not the date upon which such order actually issues.

THIS was an appeal arising out of proceedings for the execution of a decree. The decree-holders applied for execution, within time, on the 15th of January 1904. On the 21st of January 1904, the Court passed an order that notice should issue to the judgment-debtor under section 248 of the Code of Civil Procedure. The notice actually was issued on the 25th of January 1904. The next application for execution was presented on the 24th of January 1907, and it was then objected to as being barred

* Second Appeal No. 1180 of 1907 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 9th of July 1907, confirming a decree of Behari Lal Mehra, Munsif of Mirzapur, dated the 4th of May 1907.

by limitation. The Court of first instance (Munsif of Mirzapur) sustained this objection and dismissed the application for execution, and this order was upheld in appeal by the District Judge.

The decree-holder appealed to the High Court.

The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Iswar Saran*, for the appellant.

Mr. *J. Simeon*, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—This is a decree-holder's appeal. The Courts below have held that the present application to execute is barred by limitation. The application to execute was presented on the 24th of January 1907. The last preceding application was made on the 15th of January 1904. On the 21st of January 1904, the Court passed an order that notice should issue to the judgment-debtor under section 248 of the Code of Civil Procedure. The notice was actually issued on the 25th January 1904. Article 179 of schedule II of the Limitation Act allows three years from "the date of issuing notice under the Code of Civil Procedure, section 248." If the date of issuing notice be taken to be the date on which it is actually issued, the application is within time. But if it be taken to be the date on which the Court passed an order for issue of notice under section 248, the application is too late. There is a great conflict of opinion in the different High Courts as to the meaning of the words quoted above. In this conflict we are bound to follow the rulings of our own Court, and the learned vakil for the appellant admits that those rulings are against him.* We accordingly hold that this appeal must fail, and we dismiss it with costs.

Appeal dismissed.

* The rulings referred to were *Udit Narain* v. *Ram Partab Singh* (Weekly Notes, 1881, p. 120) and *Baldeo* v. *Harrison* (Weekly Notes, 1890, p. 244).

1908
June 29.

Before Mr. Justice Aikman and Mr. Justice Griffin.

HAZARI MAL (DEFENDANT) v. BHAWANI RAM AND ANOTHER (PLAINTIFFS) AND PANNA LAL AND ANOTHER (DEFENDANTS) *

Civil Procedure Code, section 34—Non-joinder of parties—Objection not taken at the earliest opportunity—Limitation.

An objection as to the non-joinder of parties alleged to be necessary ought to be raised by the defendant at the earliest opportunity; where this is not done and the parties omitted are in consequence not added until after the expiry of the period of limitation for a suit against them, the defendant will not be permitted to take advantage of the bar of limitation.

Pateshri Partap Narain Singh v. *Rudra Narain Singh* (1) and *Guruvayya Gouda* v. *Dattatraya Anant* (2) followed. *Shamrathi Singh* v. *Kishan Prasad* (3) distinguished.

THE facts which gave rise to this appeal are as follows:—

The plaintiffs, Bhawani Ram and Jawahir Lal brought the suit on the allegation that they with one Rakhab Das were proprietors of a banking and commission firm at Secundrabad, and that Hazari Mal, the principal defendant, was indebted to the firm. Rakhab Das did not join in the suit, and was made a *pro formâ* defendant. The suit was filed on the 16th of August 1906. The defendant Hazari Mal filed a written statement on the 5th of September 1906. In that he took no objection to want of parties. Upwards of six months afterwards, namely on the 20th of March 1907, he took objection to the effect that the two minor sons of Rakhab Das ought to have been joined as parties to the suit and that in their absence the suit could not proceed. Thereon the plaintiffs, in order to remove this objection, though not admitting that the minors were necessary parties, applied for their names to be added, and this was done. Objection was then taken that the suit could not be maintained, as it was barred against the added defendants at the time their names were brought upon the record. The Court of first instance, relying on the decision in *Shamrathi Singh* v. *Kishan Prasad* (3), held that the minors were necessary parties, and as they were not joined as *pro formâ* defendants until after the period of limitation for the suit, it could not be maintained. Accordingly that Court dismissed the suit. On appeal the Additional District Judge, after

* First Appeal No. 19 of 1908, from an order of Muhammad Ahmad Khan, Additional Judge of Meerut, dated the 16th of December 1907.

(1) (1904) I. L. R., 26 All., 528. (2) (1903) I. L. R., 28 Bom., 11.
(3) (1907) I. L. R., 29 All., 311.

referring to certain rulings, allowed the appeal and remanded the case for decision on the merits. Against this order of remand the defendant Hazari Mal appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellant.

Babu *Durga Charan Banerji*, for the respondents.

AIKMAN and GRIFFIN, JJ.—This is an appeal from an order of remand. The plaintiffs Bhawani Ram and Jawahir Lal brought the suit on the allegation that they with one Rakhab Das were proprietors of a banking and commission firm at Secundrabad, and that Hazari Mal, the principal defendant, was indebted to the firm. Rakhab Das did not join in the suit, and was made a *pro formâ* defendant. The suit was filed on the 16th of August 1906. The defendant Hazari Mal filed a written statement on the 5th of September 1906. In that he took no objection to want of parties. Upwards of six months afterwards, namely, on the 20th of March 1907, he took objection to the effect that the two minor sons of Rakhab Das ought to have been joined as parties to the suit and that in their absence the suit could not proceed. Thereon the plaintiffs in order to remove this objection, though not admitting that the minors were necessary parties, applied for their names to be added, and this was done. Objection was then taken that the suit could not be maintained as it was barred against the added defendants at the time their names were brought upon the record. The Court of first instance, relying on the decision in *Shamrathi Singh* v. *Kishan Prasad* (1), held that the minors were necessary parties, and as they were not joined as *pro formâ* defendants until after the period of limitation for the suit, it could not be maintained. Accordingly he dismissed the suit. On appeal the Additional District Judge, after referring to certain rulings, allowed the appeal and sent back the case for decision on the merits. The principal defendant Hazari Mal appeals from that order of remand. In our opinion this case is distinguishable from that relied on by the learned Munsif. The facts resemble more those of a case referred to in the ruling *Shamrathi Singh* v. *Kishan Prasad*, namely, the case of *Pateshri Partap Narain Singh* v. *Rudra Narain Singh* (2). In this case the objection

(1) (1907) I. L. R., 29 All., 311. (2) (1904) I. L. R., 26 All., 528.

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HAZARI MAL v. BHAWANI RAM.

to want of parties was clearly not taken at the earliest possible opportunity. The defendant belongs to the same caste and resides in the same place as the plaintiffs, and must be deemed to have known of the existence of the sons of Rakhab Das. Had he taken objection in his written statement, the case would have been different; but then, had he done so, the plaintiff could at once, within the period of limitation, have added the names of the minors. The defendant waited until a suit with the minors as defendants was barred by limitation and then took objection. In the case *Pateshri Partap Narain Singh* v. *Rudra Narain Singh* the learned Judges cited with approval a passage from a judgment of the Bombay High Court in the case *Guruvayya Gouda* v. *Dattatraya Anant* (1), where it is said:—"We must hold that the bar of limitation was not established, as the defendant's objection to non-joinder of parties having been taken at a late stage of the suit may be disregarded." We think that the Court of first instance ought not to have entertained the objection having regard to the provisions of section 34 of the Code of Civil Procedure. On the grounds stated above we uphold the decision of the Court below and dismiss the appeal with costs.

Appeal dismissed.

1908. *July* 8.

APPELLATE CRIMINAL.

Before Mr. Justice Richards and Mr. Justice Karamat Husain

EMPEROR *v.* KHEORAJ AND OTHERS. *

Act No. I of 1872 *(Indian Evidence Act), section* 30—*Confession—Joint trial—Plea of the guilty by one of the accused—Use of confession against the rest—Criminal Procedure Code, sections* 271, 342.

Where an accused person has pleaded guilty and the Court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence with other co-accused and any statement in the nature of a confession that he may make used against them. *Queen Empress* v. *Paltua* (2) followed.

THE facts of this case are as follows:—

Sixteen persons were put on their trial on a charge of dacoity. Of these one Chidda, who had previously made a confession,

* Criminal Appeal No. 522 of 1908 against an order of Rai Baijnath, Additional Sessions Judge of Moradabad, dated the 21st May 1908.

(1) (1903) I. L. R., 28 Bom., 11. (2) (1900) I. L. R., 23 All., 53.

pleaded guilty, and confirmed the statement which he had already made. The Sessions Judge, however, did not at once convict Chidda, but left him in the dock; continued the trial as against all the accused, and "considered" Chidda's confession as against the others, under section 30 of the Evidence Act. At the close of the trial the Sessions Judge convicted fourteen out of the sixteen accused. As to Chidda he recorded in his judgment:—"the Court convicts Chidda on his own plea of guilty." Of the fourteen persons convicted, three appealed to the High Court, where the question was raised whether Chidda's confession in the Court of Session could under the circumstances be taken into consideration as against the other accused.

The appellants were not represented.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

RICHARDS and KARAMAT HUSAIN, JJ.—The three appellants Kheoraj, Ilahi Bakhsh and Thannu, or Thanwa, have all been convicted under section 399, Indian Penal Code and sentenced to transportation for life. On the 29th January last a large band of dacoits attacked the house of one Dinanath Bania of mauza Badhaiti Fazalpur. The dacoity was a most lawless and audacious one. The dacoits were armed with lathies, pistols, revolvers, daggers and knives. However, the villagers were prepared for the dacoits and attacked them with considerable courage. One of the dacoits was killed by his own friends by mistake. The villagers managed to secure the corpse, which no doubt largely assisted in bringing the criminals to justice. One of the villagers was badly wounded and afterwards died. Sixteen persons were put no their trial on a charge of having taken part in the dacoity. Fourteen were convicted and all sentenced to transportation for life. Two only of the persons charged were acquitted. Of the persons who were convicted Kheoraj, Ilahi Bakhsh and Thanwa alone have appealed. The only question before us is whether or not it has been sufficiently proved that each of the appellants took part in the dacoity. A man named Girdari Singh turned approver. He was pardoned and examined

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as a witness. Chidda, one of the persons who was convicted, was evidently anxious to become an approver. He made a complete confession of his own guilt, which, strange to say, he adhered to even in the Sessions Court. In the Sessions Court he pleaded guilty. It was pointed out to him that the confession would not save him from punishment. He nevertheless said that he was in the dacoity. Towards the end of the judgment the learned Judge says that "the Court convicts Chidda on his own plea of guilty." We think it necessary at this stage to point out to the learned Judge an error in his conduct of the trial of the case. Notwithstanding Chidda's plea of guilty, he kept him in the dock with the rest of the accused. He "considered" the confession of Chidda in considering the question of the guilt or innocence of the other accused. Furthermore at the conclusion of the evidence for the prosecution he put the following question to Chidda "who were with you in the dacoity?" Section 271, clause 2, of the Code of Criminal Procedure, provides that if the accused pleads guilty the plea shall be recorded and he may be convicted thereon. It often happens that when an accused person is called upon to plead he makes a statement which may or may not amount to a plea of guilty, and it is frequently very proper that the Court should enter a plea of not guilty and proceed with the evidence. However, if there are a number of other persons being tried at the same time for the same offence the Court certainly ought not to postpone the conviction of the accused merely for the purpose of allowing the statements he may have made to be considered against the co-accused. We think that if the Court was prepared to have convicted Chidda on his plea of guilty (supposing he had been tried by himself) it ought to have at once convicted him. Section 30 of the Evidence Act provides that a confession made by one person can be considered against other persons who are being tried jointly for the same offence. In our judgment where an accused person has pleaded guilty and the Court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence. See the case of the *Queen Empress* v. *Faltua* (1). Section 342

(1) (1900) I. L. R., 23 All., 53.

of the Code of Criminal Procedure gives power to the Court at any stage of the trial to put questions to the accused for the purpose of enabling such accused to explain any circumstance appearing in the evidence against him. The section further directs at the close of the case for the prosecution to question the accused generally on the case. But the general examination is only to be for the purpose of enabling the accused to explain the circumstances appearing against him in the evidence. The question put to Chidda, namely, "who were with you in the dacoity?" was a highly improper question, if Chedda had never pleaded guilty. We now proceed to deal with the case of each of the appellants, discarding the confession and other statements of Chidda. Thanwa is mentioned by Girdhari the approver. Only one other witness identifies him, *viz.*, Suraj Mal. Suraj Mal made a mistake and identified a man as having taken part in the dacoity who could not have been there. This mistake was a mistake made by several of the other witnesses, and is perhaps explained by the fact that the man whom he purported to identify bore a striking resemblance to one of the dacoits. Thanwa from the commencement has stated that he was ill at the time the dacoity was committed. He examines several witnesses to support his allegation. He does not say that Girdhari himself bore him any enmity, but he says that a friend of Girdhari's, namely, Roshan Singh, instigated Girdhari to name him. We think there is some doubt as to the guilt of Thanwa. Kheoraj is identified by the approver Girdhari. The learned Judge says that he was identified by Dinanath and Jiwa Ram in jail and in the lower Court by Dallu. No one identifies him except Girdhari in the Sessions Court. His case is that Girdhari bore him an ill-will. He says also that he had taken two accused persons from Gariwan to the police station at Rajpura on the day the offence was committed. One witness whom he calls proves that he did bring the prisoners to Rajpura on the 29th of January and that he left the same immediately as he had "urgent business." It appears that the scene of dacoity is ten kos from Rajpura. He also examined a witness named Mizam. We think that the evidence in the Sessions Court is insufficient, or at least that a reasonable doubt exists in the case of Kheoraj also. Ilahi Bakhsh is identified by a number

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EMPEROR v. KHEORAJ.

of witnesses in addition to the informer Girdhari. Dinanath, Dallu, Chhutan, Fajji and Jiwaram son of Kewal, all identified him. We think that the case was fully proved against Ilahi Bakhsh. We allow the appeals of Thanwa and Kheoraj and setting aside the convictions and sentences in their case, we acquit them of the charge on which they were tried and direct that they be released. We dismiss the appeal of Ilahi Bakhsh and we direct that a copy of our judgment be sent to the learned Additional Judge of Moradabad.

APPELLATE CIVIL.

1908 *July* 13.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

BUDH SINGH (PLAINTIFF) v. GOPAL RAI AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Construction of document—Custom or contract.

The wajib-ul-arz of a village in the Saharanpur district of the year 1867 contained the following agreement on the part of the "khewatdars" of the village that "up to the term of the settlement and in future to the termination of the next settlement they will abide by the following terms and act upon them." Amongst the subsequent provisions were certain relating to the right of pre-emption. In a later wajib-ul-arz of 1890 no mention was made of any custom of pre-emption, but it contained these words :—"For the remaining village customs see the wajib-ul-arz prepared in 1867."

Held that the wajib-ul- arz of 1867 recorded a contract and not a custom, and that the rights conferred by it would not be perpetuated by the incorporation in the later wajib-ul-arz of the customs existing in the village.

THIS was a suit to pre-empt a sale of property situate in a mahal of the village of Gumti in the Sultanpur pargana of the district of Saharanpur. The plaintiff relied upon a wajib-ul-arz of the year 1867, the provisions of which he alleged to have been adopted in a subsequent wajib-ul-arz of 1890. In the earlier wajib-ul-arz the names of the zamindars of the village, who were styled "khewatdars" were recited and it was recorded that they agreed that up to the term of the settlement and in future to the termination of the next settlement they would abide by and act upon certain terms. Amongst these was the following provision as to pre-emption :—"If any co-sharer wishes to transfer his share he can do so, first, to his own brother; and in case of refusal by him, all his co-sharers descended from a common ancestor have a

* First Appeal No. 296 of 1906 from a decree of Girdhari Lal, Subordinate Judge of Saharanpur, dated the 18th of June 1906.

right to it." In the later wajib-ul-arz of 1890 a number of matters were referred to but no mention was made of any custom of pre-emption, but there was an entry—"For the remaining village customs see the wajib-ul-arz prepared in 1867." The Court of first instance (Subordinate Judge of Saharanpur) dismissed the plaintiff's suit. The plaintiff accordingly appealed to the High Court.

Mr. *Abdul Raoof*, for the appellant.

Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J., and KARAMAT HUSAIN, J.—This appeal arises out of a suit to enforce a claim for pre-emption. The property which is the subject of a sale lies in a *mahal* of the village Gumti in pargana Sultanpur, in the Saharanpur district, which village was partitioned in the year 1905. The plaintiff relies upon the wajib-ul-arz of the village prepared in the year 1867 and upon an alleged adoption of the provisions of that wajib-ul-arz in the later wajib-ul-arz of 1890. The question before us appears to depend upon the fact whether or not the wajib-ul-arz of 1867 is the record of a right of pre-emption existing by custom. If it be such a record, we are disposed to think upon the authorities that that right still continues to exist in the village. If, on the other hand, it is the record of a right existing by contract, then that right came to an end at the expiration of the settlement, and if it did come to an end at the expiration of the settlement, the language of the later wajib-ul-arz of 1890 would not perpetuate it. In the wajib-ul-arz of 1867 the names of the residents of the village, who are described as the khewatdars, are mentioned, and they purport to declare that "they agree that up to the term of the settlement and in future to the termination of the next settlement they will abide by the following terms and act upon them." Then follows a number of provisions, and amongst others the following provisions as to pre-emption:—"If any co-sharer wishes to transfer his share, he can do so, first to his own brother; and in case of refusal by him, all his co-sharers, descended from a common ancestor, have a right to it." Now the pre-emptor Budh Singh is a paternal uncle of the vendor, and is also a co-sharer in the village, but he is not a co-sharer in the *mahal* portion of which is the subject of the sale.

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BUDH SINGH v. GOPAL RAI.

If, however, the right to pre-empt, recorded in this wajib-ul-arz is a right existing by custom, then it would appear to us that the pre-emptor plaintiff appellant is entitled to pre-empt notwithstanding the fact that he has no share in the *mahal* portion of which is the subject of the sale. In the later wajib-ul-arz of 1890, a number of matters are referred to but no mention is made of any custom of pre-emption whatever, but the following words are to be found in it:—" For the remaining village customs see the wajib-ul-arz prepared in 1867." The plaintiff relies upon this language, and asks us to hold that it imports into this wajib-ul-arz the provision as regards pre-emption set forth in the wajib-ul-arz of 1867. It would not be unreasonable to hold that the parties intended by this language to incorporate the provisions of the earlier wajib-ul-arz as regards the custom set forth in that document. But if the right of pre-emption created by it was one arising from contract and not existing by custom, it is obvious that that right would not be perpetuated by the incorporation in the later wajib-ul-arz of the *customs* existing in the village. The right was not a right existing by custom, but a right arising from contract. Now the question as to whether or not the wajib-ul-arz of 1867 is a record of a custom or the record of a contract is one of very great difficulty. A strong argument may be based upon the language used in support of the view that it is a record of custom. We are, however, not disposed to set aside the decree of the Court below unless we are clearly satisfied that it is erroneous. We do not agree with the learned Subordinate Judge in the reasons given by him for his decision, but after giving the best consideration we can to the language of the wajib-ul-arz of 1867, we are unable to hold that it is a record of custom. This being so, the appeal fails and is dismissed with costs.

Appeal dismissed.

(See also *Maratib Husain* v. *Alam Ali*, Weekly Notes, 1907, p. 285).

Before Mr. Justice Aikman.

1908
July 21.

MAHADEO PRASAD (DEFENDANT) *v.* GORAKH PRASAD (PLAINTIFF) *

Act No. VII of 1870 *(Court Fees Act), section* 7, *ix; schedule I, article* 1—*Court fee — Decree for redemption of mortgage — Appeal on the main ground that nothing was due under the mortgage.*

Held that in the case of an appeal from a decree allowing a defendant mortgagor to redeem the mortgage on payment of a sum named therein based upon the ground that the mortgage debt has been satisfied out of the usufruct of the property mortgaged and nothing whatever was due from him the proper court fee payable was an *ad valorem* fee upon the total amount of the decree under appeal. *Nepal Rai* v. *Debi Prasad* (1) and *Reference under Court Fees Act*, 1870, (2) followed.

THIS was reference made by the Taxing Officer to the Taxing Judge under section 5 of the Court Fees Act. A memorandum of appeal having been presented for a stamp report, the Stamp Reporter made the following report:—

"This appeal has arisen out of a suit for foreclosure. The principal money expressed to be secured by the instrument of mortgage was Rs. 6,000. The defendant pleaded *inter alia*, that the mortgage debt had been paid off from the usufruct of the property, and that only 4 annas and not a 5 anna 4 pie share had been mortgaged.

"Upon the trial of the suit the lower Court passed a decree in plaintiff's favour subject to defendant's right of redemption on payment of Rs. 8,664 within six months from the date of the decree, and failing that, the entire property mortgaged, namely, 5 annas 4 pies was to be foreclosed and the defendant's right of redemption extinguished.

"The defendant appeals to this Hon'ble Court and has paid court fees on the principal mortgage money.

"Having regard to the rulings of *Nepal Rai* v. *Debi Prasad* (1) and *Reference under Court Fees Act*, 1870 (2), and to the grounds raised in the memorandum of appeal, it appears that the value of the subject-matter in dispute in appeal for the purposes of court fees is Rs. 8,664, the amount found to be payable under the mortgage in dispute, and Rs. 323 costs, total Rs. 8,987. As to costs, a distinct ground having been taken in the memorandum of appeal, an additional court fee is payable thereon (*vide*

* Stamp Report in First Appeal No. 155 of 1908.

(1) (1905) I. L. R., 27 All., 447. (2) (1905) I. L. R., 29 Mad., 367.

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MAHADEO PRASAD v. GORAKH PRASAD.

Weekly Notes, 1901, p. 21). This being so, a fee of Rs. 435 is payable. Rs. 315 having been paid, there is therefore a deficiency of Rs. 120 to be made good by the defendant appellant for this Court."

This report having come before Banerji, J., as a Judge receiving applications, he made the following order :—

"Mr. Surendra Nath Sen objects to the office report. Lay before the Taxing officer."

The Taxing officer on the 3rd of May 1908 made the following reference to the Taxing Judge :—

"I have the honour to refer for decision under the provisions of section 5 of the Court Fees Act the following question :—

"The plaintiffs sued for foreclosure. The Court of first instance gave him a decree subject to the defendant's right to redeem on the payment of Rs. 8,987 within six months.

"This sum of Rs. 8,987 is made up of Rs. 6,000, the original sum secured, Rs. 2,664 interest and Rs. 323 costs.

"The defendant mortgagor appeals. His plea in appeal is that the sum secured has been satisfied out of the usufruct. He stamps his appeal under the Court Fees Act, section 7 (ix), with reference to Rs. 6,000, the amount secured by the mortgage. The office reports that the appeal should be stamped *ad valorem* on Rs. 8,987 according to article 1 of the first schedule to the same Act. Four rulings have been cited. One of these, which was delivered by the present Chief Justice, is reported in I. L. R., 27 All., at page 447.

"This ruling was agreed with by a Divisional Bench of the Madras High Court in case reported in I. L. R., 29 Mad., at p. 367. In the Allahabad case the plaintiffs had sued for redemption. They obtained a decree subject to the payment of Rs. 1,555-14-0. They considered that they were entitled to redemption on the payment of the sum smaller by Rs. 288-11-0 than Rs. 1,555-14-0. It was held that the appeal should be stamped *ad valorem* on Rs. 288-11-0.

"In the case for decision now the defendant's prayer in appeal is that he is entitled to redeem without making any payment, that is to say, he is entitled to redemption on the payment of a sum less by Rs. 8,987 than the sum decreed by the Court of

first instance. On the principal laid down in the above ruling, I think the report of the office is correct.

"Two rulings have been quoted by the learned counsel for the appellant. One is a case decided by Sir John Edge, reported in I.L.R., 13 All., 94. The ruling in this case has been dissented from in the two cases quoted above. But as far as the present matter goes, I do not think that it is opposed to the view of the office. Sir John Edge limited his rulings to appeals in which it was impossible to value the subject-matter, *e. g.*, an appeal asking for redemption subject to the payment of an unknown amount. In the present appeal the right to redeem is not contested, and the amount the appellant seeks to avoid paying is a definite sum. The remarks in the last paragraph of the judgment appear to me to deal with a case like the present, and to fully support the view that the appellant should be required to pay on Rs. 8,987.

"The second ruling referred to on behalf of the appellant is reported in I. L. R., 10 Bom. at page 41.

"I see, however, from the report of the Taxing officer in that case that the appeals there in question 're-opened the whole question of mortgage."

"This the present appeal does not do. Therefore I do not think it applies to the present case."

The following order was passed by Aikman, J :—

I agree with the judgment of the learned Chief Justice in *Nepal Rai* v. *Debi Prasad* (1), which is against the appellant's contention. In my opinion the view expressed by the Taxing officer is right.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1908 *August 4.*

DHARAM KUNWAR (PLAINTIFF) *v.* BALWANT SINGH (DEFENDANT).*

Act No. I of 1872 *(Indian Evidence Act), section* 115—*Estoppel—Adoption—Suit by adoptive mother to set aside an adoption made by her.*

In a suit to set aside an adoption brought by the adoptive mother against her adopted son it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant; that the ceremony of adoption was carried out on the faith of this representation; that the marriage of the defendant was likewise on the strength of

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* First Appeal No. 98 of 1906, from a decree of Nihal Chandra, Subordinate Judge of Saharanpur, dated the 26th of February 1906.

(1) (1905) I. L. R., 27 All., 447.

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it celebrated, and the defendant performed the *sradh* ceremony of his adoptive father. It was further found that the defendant had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father, and that for this purpose he had incurred heavy liabilities. *Held* that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void. *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwer* (1) distinguished. *Sarat Chunder Dey* v. *Gopal Chunder Laha* (2), *Sukhbasi Lal* v. *Guman Singh* (3), *Durga* v. *Khushalo* (4), *Kannammal* v. *Virasami* (5), *Ravji Vinayakrav Jaggamath Shankarsett* v. *Lakshmibai* (6) and *Santappaya* v. *Rangappaya* (7) referred to.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal*, Babu *Jogindro Nath Chaudhri*, and Messrs. *Ahmad Karim* and *Nihal Chand*, for the appellant.

Pandit *Moti Lal Nehru*, Dr. *Satish Chandra Banerji*, Munshi *Gulzari Lal*, Babu *Surendra Nath Sen* and Babu *Benode Bihari*, for the respondent.

STANLEY, C.J. and BANERJI, J.—The title to the Landhaura estate, an extensive and valuable estate situate in the district of Saharanpur and other districts, is involved in this appeal. The plaintiff, who is the widow of the late Raja Raghubir Singh, seeks for a declaration that she had no power to adopt the defendant Balwant Singh, and that she in fact never adopted him, and that a document which is called a deed of adoption, dated the 13th of January 1899, might be declared to be void.

Raja Raghubir Singh died on the 23rd of April 1868 at the age of about 20 years. After his death his widow, the plaintiff, Rani Dharam Kunwar, gave birth to a son on the 16th of December 1868, who was named Jagat Parkash Singh. This son died on the 31st of August 1870, and on the 4th of March 1877, the plaintiff adopted a boy Tofa Singh, who was afterwards renamed Raja Narendra Singh. This adopted boy died about 2½ years after his adoption, and on the 20th of January 1883 the plaintiff adopted another boy named Ram Sarup, who was renamed Ram Padab Singh. In June 1885 Ram Padab Singh died, and a few years afterwards the plaintiff took a boy named

(1) N.-W.P., H. C. Rep., 1863, p. 103 A.
(2) (1892) I. L. R., 20 Calc., 296.
(3) (1879) I. L. R., 2 All., 366.
(4) Weekly Notes, 1882, p. 97.
(5) (1892) I. L. R., 15 Mad., 486.
(6) (1887) I. L. R., 11 Bom., 381.
(7) (1894) I. L. R., 18 Mad., 397.

Umrao Singh to live with her with a view to his adoption. This boy also died before adoption in May 1896. Then on the 2nd of June 1898 she determined to adopt another son, and amongst others two sons of Ram Newaz, namely, the defendant Balwant Singh and his brother Tungal Singh were brought to her for approval, and these two boys were permitted to live with her for some time. Ram Newaz is a man in humble circumstances owning only a small zamindari on which Rs. 50 per annum is paid for revenue. The defendant Balwant Singh was selected, and on the 13th of January 1899, the ceremony of his adoption is alleged to have been performed with all due formalities, and an agreement was executed by Ram Newaz as also by the plaintiff. It is this adoption which the plaintiff seeks to have declared invalid, her case being that she had no authority from her husband to adopt the defendant and that the adoption in fact never took place.

The learned Subordinate Judge found that the factum of the adoption was proved and that the plaintiff having adopted the defendant is estopped from alleging that she had no authority to make the adoption and accordingly dismissed the plaintiff's suit. From this decision the present appeal has been preferred.

On the 1st of May 1900, one Baldeo Singh, claiming to be the reversionary heir of Raja Raghubir Singh, brought a suit to have the adoption of the defendant set aside and in that suit impleaded as defendants both Rani Dharam Kunwar and Balwant Singh. The suit was dismissed on the 30th of May 1901 on the ground that the plaintiff was not the reversionary heir of Raja Raghubir Singh. The Court in its judgment also held that Raja Raghubir Singh did not give any authority to his wife to adopt a son and that therefore the adoption of Balwant Singh was invalid. An application was made to the Subordinate Judge by Rani Dharam Kunwar, in which she prayed that the finding that she had no authority to adopt might be embodied in the decree so as to enable her to appeal from it and have it reversed. This application was granted. From the decree of the Subordinate Judge Baldeo Singh appealed to the High Court. The appeal was heard before a Bench of which one of us was a member and on the 10th of December 1903 was dismissed. Four days after judgment was

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pronounced an application was made to the Court on behalf of Balwant Singh under the following circumstances. When the learned Subordinate Judge delivered his judgment his decree was that the plaintiff's claim be dismissed with costs, but subsequently on an application made by Rani Dharam Kunwar he directed that his findings on three issues should be added to the decree. The findings on the second and third issues were to the effect that it had not been proved that Rani Dharam Kunwar had authority from her husband to make the adoption, but that as a matter of fact she had adopted Balwant Singh. The application was that the findings on these issues should be struck out of the decree, the contention being that, as the plaintiff Baldeo Singh had no *locus standi* to contest the adoption, it was unnecessary for the Subordinate Judge to have tried any other issue and that the findings on any other issues were mere *obiter dicta*, which should not have been added to the decree. This application was resisted by the defendant Rani Dharam Kunwar, and the Court was frankly informed by the learned advocate who appeared for her that her object in desiring to have the additions in question made to the decree was that they might be used by her as *res judicata* in future litigation between herself and Balwant Singh. The Court acceded to the application and directed that the two findings to which we have referred should be struck out of the decree. The litigation which was then in contemplation is the suit out of which this appeal has arisen.

The learned Subordinate Judge did not determine, as we have said, whether Rani Dharam Kunwar had authority from her husband to adopt. He dismissed the suit on the ground that she by her conduct was estopped from alleging that no such authority was given to her. Whether or not he was right in this decision is the main question in this appeal.

As to the factum of the adoption there cannot be in our judgment any doubt whatever. The evidence shows that not merely was the adoption ceremony performed, but it was performed with great pomp and ceremony. Invitations to, amongst others, the principal European inhabitants, including the Collector, were issued, and a large number attended. The

proceedings lasted throughout the day, and photographs of the scene were taken, which have been produced. The fact of the adoption was indeed not seriously contested by the plaintiff's learned advocate. Not merely is it established by the oral evidence, which is voluminous, but by two documents, one bearing the seal of the plaintiff herself and the other signed by Ram Newal the father of the defendant. Those documents were registered on the 19th of January 1899, the execution of the one which bears the seal of the plaintiff being then admitted by her. In this last mentioned document there is a recital that Raja Raghubir Singh entertained during his life-time the wish that a son might be born to him who would fulfil the religious needs and become the owner of his estates, that he had no male or female issue in his life-time and that as the plaintiff was then pregnant he gave the following direction to her:—"If (God forbid) you give birth to a daughter, or if a son be born, but die after his birth, I strictly order you to adopt some boy so that he may perform my *sradh* ceremony and yours and perpetuate my name and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid) the son who may be adopted under this authority should die in your life-time you will have power to make another adoption." Then there is a recital of the birth and death of her son Raja Jagat Parkash Singh, and that in compliance with the will of her husband the plaintiff had adopted a boy called Sewa Singh, and Ram Padab, both of whom died young and unmarried. Then the selection of Balwant Singh for adoption is mentioned and this is succeeded by the following passage:—"This 13th day of January 1898, after performing the necessary ceremony, I adopted Balwant Singh, son of Chaudhri Ram Newaz, to myself and my husband in the presence of the gentry, the district authorities and other European gentlemen and the members of my brotherhood, and Chaudhri Ram Newaz, the natural father of the said Balwant Singh, gave Balwant Singh to me as an adopted son." The document provides that so long as the plaintiff lives she should remain the owner and possessor of the estates. This instrument bears the signature of no less than 28 attesting witnesses, and as we have said

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was registered upon the admission of execution of the plaintiff herself.

In the contemporaneous document which was executed by Ram Newaz he admitted that he had given his son Balwant Singh to the plaintiff as an adopted son for her and her husband and that the usual religious ceremonies and those connected with the *bradari* had been performed with all publicity the same day. Six witnesses attest the execution of this document including the defendant Balwant Singh. In the first mentioned document there is a positive assertion by the plaintiff that she had authority to adopt Balwant Singh.

In addition to this we have the positive assertion of the plaintiff in her written statement in the suit of *Baldeo Singh* v. *Rani Dharam Kunwar and Balwant Singh* that she had authority to adopt the defendant. In the 8th paragraph of that written statement (No. 224 of the record) is the following passage:—"The defendant adopted Balwant Singh defendant under lawful authority with full publicity. The said adoption is valid in every respect." We have thus clearly established the representation of authority to adopt made by the plaintiff and also the fact of the adoption. In addition to this it is an admitted fact that the marriage of the defendant was carried out by and at the expense of the plaintiff. It is also not disputed that after his adoption the defendant performed the *sradh* ceremonies of Raja Raghubir Singh. In his evidence Balwant Singh deposed that "the first *kanagat* (*i. e.*, offering of cakes and oblations of water to the *manes* of ancestors) which took place after adoption was caused by the Rani to be observed by me, afterwards I continued observing the *kanagat* which took place." This is not contradicted. The question then is whether or not in view of those facts the Court below was right in holding that the plaintiff is estopped from denying her authority to adopt the defendant.

We are not aware of any case, and none has been cited to us, in which a plaintiff has successfully raised such a contention as has been laid before us by the plaintiff's learned advocate. In the most solemn way the plaintiff represented that she had authority to adopt and allowed the adoption of the defendant to be carried out with the utmost publicity and with great pomp and

ceremony. Moreover, she executed a document which should serve thereafter as evidence of the fact of the adoption. In the last paragraph of it we find the statement that "this document which is a deed of adoption has been executed by me and I have affixed my seal to it with my own hands in order that it may serve as evidence." After the adoption the defendant lived with the plaintiff as her adopted son, was married as such at her expense, and, as we have said, performed the *sradh* of her husband.

It is contended on her behalf that this conduct of the plaintiff does not operate as an estoppel; that in order to create an estoppel it must be shown that the person setting it up has suffered some loss or detriment, and that in this case the defendant could not show that he had suffered any loss or detriment; that both families belong to the same *gotra*, and that the defendant can return to his father's house and obtain his share of his father's property; that the fact that he held the position of a Raja for some years was beneficial to him and in no way detrimental. We do not agree as to this. The experience of the defendant as a Raja would entirely unfit him for the life of a cultivator. But if it were necessary to show pecuniary loss, we find that the defendant incurred heavy liabilities in defending his adoption in the suit brought by Baldeo Singh. In his evidence he deposed, and he is not contradicted, that Man Singh prosecuted this suit on his behalf and paid the expenses of it, and that some of the money expended by him was still due, and further that Lala Niranjan Lal, an Honorary Magistrate of Saharanpur, had lent him a sum of Rs. 23,000. If he had not been led to believe that he was the adopted son of Raja Raghubir Singh he would not have incurred these liabilities; large sums of money would undoubtedly not have been lent to him. So that, if it were necessary to prove detriment or loss from the conduct of the plaintiff on which the estoppel is based, these facts are in our opinion sufficient for that purpose. Section 115 of the Evidence Act regulates the law of estoppel. It prescribes that "when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such

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person or his representative to deny the truth of that thing." Lord Shand observed of this doctrine as follows:—"What the law and the Indian Statute mainly regard is the position of the person who was induced to act, and the principle on which the law and the Statute rest is that it would be most inequitable and unjust to him that if another by a representation made or by conduct amounting to a representation has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge or under error, *sibi imputet.* It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do." *Surat Chunder Dey* v. *Gopal Chunder Laha,* (1). To allow the plaintiff to repudiate the adoption would not only, we may observe, in this case be detrimental to the defendant, but to third parties, such as the creditors of the defendant, who advanced money to him on the faith of his position as Raja. It is highly probable also that acting on the same assurance his wife's father gave her in marriage to him. We know of no authority, and none has been cited to us, in which a widow who had taken a boy in adoption to her husband was afterwards successful in a suit for a declaration that the adoption was invalid. Two cases in this High Court were cited to us in which a similar suit failed. The first is the case of *Sukhbasi Lal* v. *Guman Singh* (2). In that case an adoptive father claimed a declaration that the defendant was not his adopted son, on the ground, amongst others, that he had not been adopted in the manner and according to the ceremonies required by Hindu Law and had failed to perform a certain agreement entered into by him with the plaintiff. In this agreement the plaintiff agreed on his part to consider the defendant as an adopted son. The defendant set up as a defence to the suit that the plaintiff could not be allowed to deny the validity of the adoption, as in a petition presented by him to the Revenue Court on the 27th of April 1860 he had declared that he had adopted

(1) (1892) I. L. R., 20 Calc., 296, at p. 311. (2) (1879) I. L. R., 2 All., 366.

the defendant; that all the ceremonies of adoption required by Hindu Law had been performed, and that the defendant would succeed to his property on his death, and had confirmed such declaration by his subsequent conduct, and the defendant had been excluded from inheriting his natural father's property. The Court of first instance held that the plaintiff was estopped from denying the validity of the adoption. On appeal this decision was upheld. Spankie, J., in his judgment observed:—"The plaintiff having himself affirmed the adoption as having been fully and formally made after the performance of all the ceremonies required by the Hindu Law cannot now disaffirm it and sue for a declaration that it is invalid. Indeed when the adoption has once been absolutely made and acted on for years it cannot be cancelled. It is certain that an adopted child cannot renounce the family of his adoptive father. He is entirely separated from his own family when his natural father disposes of him. The adoptive father in accepting an adopted son is bound by his act which secures to the adopted son all the rights of a son born to the family. He is as much a son as if he had been begotten by his adoptive father." The only difference between this case and the case before us is that in it the adoptive father and the adopted son belonged to different *gotras*, whilst in this case they belonged to the same *gotra*. This does not, we think, materially differentiate the two cases.

The other case is that of *Durga* v. *Khushalo* (1). In that case, on the death of her husband Kishen Lal, the respondent Khushalo admitted in the Revenue Court that her husband had adopted Durga the appellant and prayed that her and his name might be recorded in respect of the property left by her husband. Subsequently the daughters of Kishen Lal sued Khushalo and Durga for a declaration that Durga was not the adopted son of Khushalo and obtained a decree. After that Khushalo brought a suit against Durga for possession of her husband's estate claiming as her husband's heir and denying the adoption of Durga. Straight and Tyrrell, JJ. dismissed the suit, holding that in view of her declaration and conduct in the Revenue Court the respondent was not competent to maintain the suit, and that as

(1) Weekly Notes, 1882, p. 97.

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between her and Durga she was estopped from maintaining it. This was a much weaker case for the application of the doctrine of estoppel than the one which is before us.

The learned advocate for the respondent relied upon the decision in *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwer* (1). In that case the plaintiff claimed to succeed to certain property as the adopted son of Thakoor Chutturbhooj Singh, the husband of the defendant Thakooranee Mehtab Koonwer. The daughter of Thakoor Chutturbhooj Singh was also impleaded as a defendant. The plaintiff appears to have been brought up and regarded as an adopted son and as the heir to the property up to the end of 1863, when in the record of the paper of administration of Kotla khas, the estate in dispute, the Thakooranee designated Oomrao Singh as one brought up and educated at her expense from childhood saying that his succession on her death was to depend upon her pleasure, it being conditional on his good behaviour. This declaration gave rise to ill-feeling and disputes, which ultimately led to the suit. The plaintiff set up the case that he was validly adopted. Mehtab Koonwer denied the adoption. The other defendant in her written statement denied that any authority to adopt had been given, and she also contended that an agreement of the 22nd of January 1864 which purported to settle the right in the property upon the plaintiff was not binding on her. It was contended that it did not lie in the mouth of Mehtab Koonwer to disclaim the plaintiff as a son and to deny his right to succeed to the property of her husband after her treatment and recognition of him as an adopted son for 14 years. It was held that she was not estopped from doing so, on the ground that it was never the intention of the Thakooranee that the plaintiff should supersede her in the management and enjoyment of the property without her consent, and that she had not precluded herself from setting up the rigid provisions of the Hindu Law; in other words, that if there had been no valid adoption she might resist the attempt to eject her upon that ground, seeing that she intended to retain possession during the term of her life. It was further held that a valid adoption was not proved by the plaintiff, and his suit was dismissed. It will be observed that in this case an

(1) N.-W. P., H. C. Rep., 1868, p. 103A.

estoppel could not be set up as against the second defendant, and that the suit was not one by an alleged adoptive mother to have an adoption set aside, but was a suit by the plaintiff claiming possession of the adoptive father's property. This case therefore does not give much support to the plaintiff's contention.

Upon the whole we are of opinion that the Court below rightly held that the plaintiff was estopped from setting up the alleged invalidity of the plaintiff's adoption. The plaintiff represented that she had authority to adopt, and this representation was acted on by the defendant. The ceremony of adoption was carried out on the faith of this representation. The marriage of the defendant was likewise on the strength of it celebrated, and the defendant performed the *sradh* ceremonies of his adoptive father. In addition to this we have the fact that the defendant resisted the suit of Baldeo Singh, in which the validity of the adoption was impeached, and was supported in his defence by the plaintiff and incurred heavy liabilities in raising funds for the purposes of his defence. These matters appear to us to put it out of the power of the plaintiff to maintain a suit for a declaration that her solemn act of adoption was without authority. We are supported in this view by the decision in the following cases :—*Kannammal* v. *Virasami* (1), *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakhshmibai* (2) and *Santappayya* v. *Rangappaya* (3). We might further say that the suit, in so far as it is a suit for a declaration that the plaintiff had no power to adopt, is one in which it is discretionary with the Court to give or refuse relief. We should hesitate in the circumstances of this case before passing a decree in favour of the plaintiff for such a declaration in view of her conduct and of the false position in which the defendant would be placed if her representation as to authority were held not to be binding on her. We therefore dismiss the appeal with costs.

Appeal dismissed.

(1) (1892) I. L. R., 15 Mad., 486. (2) (1887) I. L. R., 11 Bom., 381.
(3) (1894) I. L. R., 18 Mad., 397.

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August 8.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Griffin.

KUBRA JAN (PLAINTIFF) *v.* RAM BALI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, sections 16, 19—*Misjoinder of parties—Multifariousness—Suit by heir to recover property from co-heir and transferees from him—Property situate in different districts—Compromise of part of claim—Jurisdiction.*

The plaintiff sued as heiress of her father to recover from her brother and from certain transferees from him her share in the property of her deceased father. The suit was brought in the Court of the Subordinate Judge of Bareilly. Part of the property claimed was situated in the Bareilly district and part in the district of Bara Banki in Oudh. During the course of the suit a compromise was arrived at regarding the Bareilly property and the suit proceeded with reference to the property in Oudh alone. *Held* (1) that the plaintiff had properly impleaded her brother and the transferees from him as co-defendants in one suit, and (2) that, there being no fraud or improper motive alleged with reference either to the compromise or to the filing of the suit in the court at Bareilly, that court was not by reason of the compromise divested of jurisdiction to hear and decide the suit in respect of the property situate in Oudh. *Ram Raji* v. *Dhup Narain* (1) overruled. *Indar Kuar* v. *Gur Prasad* (2), *Mazhar Ali Khan* v. *Sajjad Husain Khan* (3), *Parbati Kunwar* v. *Mahmud Fatima* (4), *Ishan Chunder Hazra* v. *Rameswar Mondol* (5) and *Nundo Kumar Nasker* v. *Banomali Gayan* (6) referred to. *Ganeshi Lal* v. *Khairati Singh* (7) distinguished. *Khatija* v. *Ismail* (8) followed.

THIS was a suit brought by the daughter of one Bande Ali to recover from her brother Akbar Husain and a number of other defendants, transferees from him, her share in the property of her deceased father. This property was situate in the district of Bareilly, and also in the district of Bara Banki in Oudh. It appears that Akbar Husain transferred the Bareilly property to the defendants Nos. 2 to 8 and the Bara Banki property to persons from whom the defendant respondent Ram Bali acquired it by virtue of a decree for pre-emption. The suit in regard to the Bareilly property was compromised, with the result that the claim

* Second Appeal No. 941 of 1907 from a decree of E. O. E. Leggatt, District Judge of Bareilly, dated the 8th of June 1907, reversing a decree of Pitambar Joshi, Subordinate Judge of Bareilly, dated the 26th of March 1906.

(1) Weekly Notes, 1885, p. 125.
(2) (1888) I. L. R., 11 All., 33.
(3) (1902) I. L. R., 24 All., 358.
(4) (1907) I. L. R., 29 All., 267.
(5) (1897) I. L. R., 24 Calc., 831.
(6) (1902) I. L. R., 29 Calc., 871.
(7) (1894) I. L. R., 16 All., 279.
(8) (1889) I. L. R., 12 Mad., 380.

in respect of that property was abandoned, and the suit proceeded as regards the Bara Banki property only.

The first Court (Subordinate Judge of Bareilly) decreed the suit. But upon appeal the lower appellate Court (District Judge of Bareilly) reversed the decree and dismissed the plaintiff's suit, holding, on the authority of the case of *Ram Raji* v. *Dhup Narain* (1) that the Court in Bareilly had no jurisdiction to pass a decree in the suit.

Maulvi *Ghulam Mujtaba*, for the appellant contended that the suit was not bad for multifariousness, nor did the fact that the suit had been compromised so far as it related to the Bareilly property deprive the Bareilly Courts of jurisdiction. He relied on *Inda Kuar* v. *Gur Prasad* (2), *Mazhar Ali Khan* v. *Sajjad Husain Khan* (3), *Parbati Kunwar* v. *Mahmud Fatima* (4), *Khatija* v. *Ismail* (5), and *Harchandar* v. *Lal Bahadur* (6).

Mr. *Muhammad Ishaq Khan* (with whom Munshi *Jang Bahadur Lal*), for the respondents, relied on *Ram Raji* v. *Dhup Narain* (7), *Ganeshi Lal* v. *Khairati Singh* (8) and *Jhandu Mal* v. *Pirthi* (9).

STANLEY, C.J.—This appeal has been laid before a Full Bench by reason of a conflict in the authorities upon a question raised in the appeal. The suit is one by the daughter of one Bande Ali to recover from her brother Akbar Husain and a number of other defendants, transferees from him, her share in the property of her deceased father. This property is situate in the district of Bareilly and also in the district of Bara Banki in Oudh. It appears that Akbar Husain transferred the Bareilly property to the defendants Nos. 2 to 8 and the Bara Banki property to persons from whom the defendant respondent Ram Bali acquired it by virtue of a decree for pre-emption. The suit in regard to the Bareilly property was compromised, with the result that the claim in respect of that property was abandoned, and the suit proceeded as regards the Bara Banki property only.

(1) Weekly Notes, 1885, p. 125.
(2) (1888) I. L. R., 11 All., 33.
(3) (1902) I. L. R., 24 All., 358.
(4) (1907) I. L. R., 29 All., 267.
(5) (1889) I. L. R., 12 Mad., 380.
(6) (1894) I. L. R., 16 All., 359.
(7) Weekly Notes, 1885, p. 125.
(8) (1894) I. L. R., 16 All., 359.
(9) Weekly Notes, 1907, 53.

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The first Court decreed the suit. But upon appeal the Lower Appellate Court reversed the decree and dismissed the plaintiff's suit, holding, on the authority of the case of *Ram Raji* v. *Dhup Narain* (1) that the Court in Bareilly had no jurisdiction to pass a decree in the suit.

From that decree the present appeal has been preferred. The questions in the case are whether the suit is bad for multifariousness and whether the Subordinate Judge of Bareilly was justified in entertaining it after the compromise of the claim in respect of the Bareilly property.

There appears to be no doubt that under section 19 of the Code of Civil Procedure the plaintiff was justified in instituting the suit in the Bareilly Court unless it be that the claim was defective for multifariousness. We have therefore first to consider whether or not the suit of the plaintiff was bad for this reason.

The claim of the plaintiff was to recover from her brother her co-heir and transferees from him her share of the property of her father. The cause of action, as it appears to me, was the withholding of possession of her share, and it accrued to her when such possession was withheld. Her brother appropriated the share of the property which belonged to her and any title which his transferees possess is derived from him alone. There were not two causes of action, one against her brother and the other against the transferees of her brother, but a single cause of action, namely, the infringement of the plaintiff's right by her brother, out of which the claim of the other defendants arose. This view is supported by several authorities, and amongst others that of *Indar Kuar* v. *Gur Prasad* (2). In that case the plaintiff claimed the property in dispute by right of inheritance from his deceased mother, and impleaded in the suit several defendants, some of whom derived their title as mortgagees from one of the defendants. It was held that inasmuch as the title of the defendant mortgagee was derived from defendant No. 1, his mortgagor, and stood or fell with the failure or success of the plaintiff's claim against the latter, there were not two causes of action, but one, namely, the infringement

(1) Weekly Notes, 1885, p. 125. (2) (1888) I. L. R., 11 All., 33.

of the plaintiff's right by the defendant No. 1, and that the suit was not bad for misjoinder of causes of action. In the case of *Mazhar Ali Khan* v. *Sajjad Husain Khan* (1) Mazhar Ali Khan came into Court claiming a portion of the inheritance of a deceased Muhammadan on the allegation that he had by two separate sale-deeds of two different dates purchased the property from two of the heirs of the deceased and that the property was withheld from him by another heir of the deceased who was in possession of some of it and by certain transferees of other portions from the said heir. Both the remaining heir and the transferees from him were made defendants. It was held by my brothers Banerji and Aikman that there was no misjoinder of parties or causes of action in such a suit. A similar question was considered by another Bench of this Court of which I was a member in the case of *Parbati Kunwar* v. *Mahmud Fatima* (2). In that case the plaintiffs sued as heirs of their father to recover various portions of their father's estate from the hands of different alienees. It was held that the fact that the defendants set up different titles to the various portions held by them would not render the suit bad for multifariousness. The plaintiffs had one cause of action, namely, the right on the death of their father to obtain possession of their shares of his property. In coming to that conclusion we had the support of the ruling to which I have alluded and also of two decisions of the Calcutta High Court passages out of which were quoted in the judgment. These cases are *Ishan Chunder* v. *Rameswar Mondol* (3), and *Nundo Kumar Nasker* v. *Banomali Gayan* (4). In the first of these two cases it was held by O'Kinealy and Hill, JJ., that in a suit for ejectment against several defendants who set up various titles to different parts of the land claimed, there was only one cause of action, not several distinct and separate causes of action. In the other case the defence that the suit was bad for multifariousness was set up, the allegation of the defendants being that they were severally in possession of different and distinct portions of the land in dispute under different demises made by the first defendant and that there was no community

(1) (1902) I. L. R., 24 All., 358.
(2) (1907) I. L. R., 29 All., 267.
(3) (1897) I. L. R., 24 Calc., 831.
(4) (1902) I. L. R., 29 Calc., 871.

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of interest. I quote portion of the judgment in that case which appears to me to be apposite. In delivering their judgment Hill and Brett, JJ., observed:—"The cause of action of a plaintiff sueing in ejectment cannot, so far as we can perceive, be affected by the title under which the defendant professes to hold possession. It matters not to the plaintiff how the defendant may explain the fact that he is in possession or seek to defend his possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him, and that fact gives him his cause of action. If this is so where there is but one person in possession, can there be a difference when the land is in the possession of more than one? We think not. It appears to us, so far as the plaintiff's cause of action is concerned, that it is a matter of indifference to him upon what grounds the different persons in possession may seek to justify the wrongful detention of what is his. What he is entitled to claim is the recovery of possession of his land as a whole and not in fragments, and we think that all persons who oppose him in the enforcement of that right are concerned in his cause of action and ought accordingly to be made parties to a suit in which he seeks to give effect to it." I agree in these observations, and they seem to me to be applicable to the case before us. The plaintiff is claiming her share of her father's property. She finds her brother and transferees from her brother in possession. She is not under such circumstances obliged to bring independent actions against her brother and each of the transferees, but, claiming, as she does, title from her father, and having, as I think, only one cause of action, she may properly implead all the parties in possession as defendants in one suit.

We have been pressed very much with the decision of a Bench of this High Court in the case of *Ram Raji* v. *Dhup Narain* (1).—In that case under circumstances very similar to those in the case before us Petheram, C. J., and Brodhurst, J. held that a similar suit was not maintainable. In that case the property which was claimed was situate in the Gorakhpur district and also in Oudh. During the pendency of the suit

(1) Weekly Notes, 1885, p. 125.

there was a compromise in respect of the Gorakhpur property, and in consequence of this the learned District Judge, reversing the decision of the Subordinate Judge, held that the Subordinate Judge had acted without jurisdiction in deciding the question between the parties in regard to the property situate in Oudh on the ground that it was an undeniable misjoinder of causes of action which gave the Subordinate Judge apparent jurisdiction under section 19 of the Code of Civil Procedure, but that in point of fact he was not competent to entertain the part of the claim which related to the property situate in Oudh. The learned Judges upheld the decision of the District Judge upon the ground stated in the judgment. Petheram, C. J., in the course of his judgment says:—"The learned Judge was of opinion that the Court had no jurisdiction to decide the suit, and I think that he was right. When a suit is brought against *A* in respect of property situate in one district and against *B* in respect of property situate in another district, I do not think that the fact that there is a common root to the plaintiff's claim makes a single cause of action upon which he is entitled to bring a single suit. I think therefore that the claim in respect of the property in Oudh was properly the subject of a separate suit, and that therefore the provisions of section 16 must be applied, which says that suits are to be instituted in the Court within the local limits of whose jurisdiction the property is situate." The learned Judges decided that case therefore on the ground that the plaintiff had not one cause of action only but several causes of action in respect of the property in the two districts. I am with all respect, unable to agree with them as to this. I think that the cases to which I have referred were rightly decided, and they conclusively show that there was only one cause of action and that cause of action was the infringement of the plaintiff's title. I am unable therefore to agree in this decision.

Mr. *Ishaq Khan* on behalf of the respondents also relied upon the case of *Ganeshi Lal* v. *Khairati Singh* (1) as supporting his contention. That was a suit in which the plaintiff claimed to be entitled on the death of a Hindu widow to the possession of

(1) (1894) I. L. R., 16 All., 279.

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certain immovable property, and brought a suit against three sets of defendants, being persons to whom the widow in her lifetime had by separate alienations transferred separate portions of the property claimed. It was held that the suit was bad for multifariousness. It will be at once noticed that this was a suit, not against one of the heirs of a deceased person and the transferees from such heir, but against three sets of transferees from a Hindu widow. In such a case the transferees, or some of them, may have acquired a good title from their transferor; for instance, in the case of a sale to meet a legal necessity, whilst to others of the transferees no such defence might be open. The facts are not identical with the facts in the case before us, though I think the judgment of the learned Judges does lend some support to the argument which has been laid before us.

Again, it is said that after the compromise in respect of the Bareilly property the Court ceased to have any jurisdiction to deal with the plaintiff's claim, that is, that though the Bareilly Court had jurisdiction, when the plaint was filed, to deal with the suit, it ceased to have jurisdiction when portion of the property claimed was withdrawn from the litigation. It seems to me that once jurisdiction is vested in a Court, in the absence of a provision of law to the contrary, that jurisdiction will not be taken away by any act of the parties. There is no allegation here that the plaint was filed in the Bareilly Court with any intention to defeat the provisions of the Code of Civil Procedure as regards the venue of suits for recovery of immovable property. If any fraud of that kind had been alleged and proved, other considerations would arise. But in this case, as I have said, no such suggestion has been made.

The learned Council for the respondents has not been able to point out to us any provision of law whereby jurisdiction once vested is taken away in a case of this kind, and I am unable to yield to the contention which has been raised by him. I am supported in this view by the ruling of a Bench of the Madras High Court in the case of *Khatija* v. *Ismail* (1). Muttusami Ayyar and Parker, JJ., in their judgment in that case observed :—"It is not denied that the Subordinate Judge had

(1) (1889) I. L. R., 12 Mad., 380.

jurisdiction over the suit when it was filed. As originally framed it embodied a claim to a share of immovable property situated partly in Mangalore and partly in Bhatkal. The subsequent withdrawal of the claim in regard to the property at Mangalore on the ground that there was a compromise entered into with the defendants who had it in their possession could not, in the absence of a positive rule of law, operate to take away the jurisdiction which had once vested, unless the compromise was shown to have been otherwise than *bonâ fide* and a mere contrivance to defeat or a fraud upon the policy of the rule of procedure as to local jurisdiction."

For these reasons I would allow the appeal, set aside the decree of the lower appellate Court and remand the appeal to that Court for determination on the merits.

BANERJI, J.—I am entirely of the same opinion. The decision of this Court in *Ram Raji* v. *Dhup Narain* (1) no doubt supports the view of the learned Judge, but with great respect to the learned Judges of this Court who decided that case, I am unable to agree with them. That decision is based on the consideration that the suit offended against the provisions of section 16 of the Code of Civil Procedure. The learned Judges were of opinion that a single suit could not be brought against the different transferees of the property, and that there was a misjoinder of causes of action. For the reasons stated by the learned Chief Justice I am unable to hold that there were different causes of action which had been joined together in the same suit. The plaintiff's cause of action was the infringement of her title by a single person, and, as the titles of the other defendants were derived from the person who infringed the plaintiff's title, there was a single cause of action against the different defendants. This view has been held in the numerous cases to which the learned Chief Justice has referred, and it is unnecessary for me to cite them again. The plaintiff was therefore competent to maintain a single suit both against the transferor and his transferees. Under section 19 of the Code of Civil Procedure the Court in which a part of the property was situate had jurisdiction to entertain the suit. The Court at Bareilly in this case had

(1) Weekly Notes, 1885, p. 125.

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therefore jurisdiction over the suit and rightly entertained it when it was instituted. The fact that a portion of the claim was withdrawn could not, in the absence of fraud, oust a Court of its jurisdiction. If the withdrawal was the result of an intention to defeat the provisions of the law and to confer jurisdiction on a Court which would otherwise have no jurisdiction that would be a different matter. But, as in the present case there is no suggestion of fraud, the mere fact of a portion of the claim being abandoned by a compromise could not, in the absence of any statutory provision, divest the Court of the jurisdiction which was vested in it by law. I am not aware of any such provision and the learned counsel has referred us to none. For these reasons I concur in the order proposed by the learned Chief Justice.

GRIFFIN, J.—I concur with the learned Chief Justice in the order proposed by him.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the learned District Judge be set aside and the appeal be remanded to him under section 562 of the Code of Civil Procedure with directions that it be reinstated in the file of pending appeals in its original number and be disposed of on the merits, regard being had to the observations which have been made by us in our judgments. We direct that the costs of this appeal and the costs heretofore incurred do abide the event.

Appeal decreed and cause remanded.

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APPELLATE CRIMINAL.

Before Mr. Justice Richards and Mr. Justice Karamat Husain.

EMPEROR *v.* BHAGWAN DIN AND ANOTHER. *

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 302, 304, 325, 328 *and* 329—*Administration of dhatura for the purpose of facilitating robbery—Death of person to whom dhatura is so administered—Offence not murder, but causing grievous hurt.*

Where, for the purpose of facilitating robbery, dhatura was administered by two persons to certain travellers, in consequence of which one of the travellers died and others were made seriously ill, it was *held* that in respect

* Criminal Appeal No. 350 of 1908 against an order of S. R. Daniels, Sessions Judge of Cawnpore, dated the 27th of March 1908.

of the traveller who died the offence committed was that punishable under section 325 of the Indian Penal Code, *viz.*, grievous hurt : and in respect of the travellers who did not die the offence committed was that defined by section 328 of the Code. *Queen Empress* v. *Tulsha* (1) not followed.

THE two accused in this case, Bhagwan Din and Ram Prasad, were found to have administered dhatura to certain travellers for the purpose of facilitating the robbery of their effects. It was also found that in consequence of such administration of dhatura by the two accused one of the travellers, by name Sidhua, died. Bhagwan Din and Ram Prasad were convicted by the Joint Sessions Judge of Cawnpore each upon two charges, one under section 304 of the Indian Penal Code, and one under section 328. Bhagwan Din was sentenced to seven years' rigorous imprisonment on each charge, and Ram Prasad to four years on each charge, and they were formally acquitted of a charge under section 302 of the Indian Penal Code, which had also been framed against them. The convicts appealed against these convictions and sentences to the High Court.

The appeals first came before Knox, J., who was of opinion that section 304 did not apply, and directed notice to go to both accused to show cause why they should not be convicted under section 329 and their sentences enhanced.

The appeal and the rule then came before a Bench consisting of Aikman and Griffin, JJ., before whom it was represented by the Assistant Government Advocate that the ruling in *Queen Empress* v. *Tulsha* (1) applied to the case and that the Sessions Judge was wrong in acquitting the accused of the charge under section 302. The case was then adjourned in order that the attention of Government might be drawn to the case with a view to an appeal being filed against the acquittal of the accused under section 302. The case was accordingly brought to the notice of Government, and eventually an appeal under section 417 of the Code of Criminal Procedure was filed. This appeal, together with the appeals of the convicts and the rule issued by Knox, J., was then put up for hearing before a Bench consisting of Richards and Karamat Husain, JJ. As to the appeal on behalf of the Local Government it was urged that the case was governed by the ruling above referred to and that a conviction ought

(1) (1897) I. L. R., 20 All., 143.

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to have been recorded under section 302 of the Indian Penal Code.

The Government Advocate (Mr. *W. Wallach*), for the Crown.

The accused were not represented.

RICHARDS and KARAMAT HUSAIN, JJ.—In this case Ram Prasad and Bhagwan Din have both been convicted under sections 328 and 304, Indian Penal Code. Bhagwan Din has been sentenced to seven years' rigorous imprisonment under each section to run consecutively. Ram Prasad has been sentenced to four years under each section to run concurrently. Both Ram Prasad and Bhagwan Din have appealed. When the appeal came before Mr. Justice Knox he ordered that notice should go to the accused to show cause why they should not be convicted under section 329 of the Indian Penal Code and the sentences enhanced. The learned Judge was of opinion that the case did not fall under section 304, Indian Penal Code. After the case had come up before a Bench of two Judges an appeal was instituted on behalf of the Government against the acquittal of the accused under section 302, Indian Penal Code. The evidence has been most carefully dealt with in the judgment of the learned Sessions Judge, and we have not the smallest doubt about the facts of the case, which are shortly as follows:—Bhagwan Din in the guise of a sadhu and Ram Prasad, a youth with him, administered dhatura poison to some four travellers whom they met on the road between Cawnpore and Allahabad, the motive being unquestionably to rob these persons. Sidhua, one of the persons poisoned, died as the result of the poisoning There was a small boy with the two accused of the name of Mahadeo, and he was, as we think, very properly acquitted. We agree with our learned brother that the case does not fall under section 304. If the accused administered the dhatura with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that they were likely by administering the dhatura to cause death, they would be guilty of culpable homicide and their act would not have come within any of the exceptions mentioned in section 300. We, however, think that the accused cannot be convicted under

section 329. That section provides that whoever voluntarily causes grievous hurt for the purpose of extorting, etc. Extortion is defined in section 383, Indian Penal Code, and although we think that grievous hurt was caused to Sidhua, it was not for the purpose of "extortion" within the meaning of section 329. Possibly the case might have come under section 326, Indian Penal Code, but that is not the section under which notice went to the appellants.

With regard to the appeal of the Government, we do not feel absolutely convinced that the accused or either of them had any intention to cause bodily injury likely to cause death, or knowledge that their act was likely to cause death. Dhatura is not exactly a deadly poison, and may often be given for the purpose of merely stupifying a victim. We think, however, that the offence so far as Bhagwan Din is concerned was a very serious one and deserves serious punishment.

Ram Prasad is about 14 years of age and may be considered to have been under the influence of Bhagwan Din. We dismiss the appeal of the Government. We alter the conviction of Bhagwan Din from a conviction under section 304 to a conviction under section 325, but maintain the sentence of seven years' rigorous imprisonment. We set aside the conviction and sentence of Ram Prasad under section 304 and acquit him of the charge under that section.

The appeal of Bhagwan Din under section 328 is dismissed. The two sentences of seven years each imposed upon Bhagwan Din will run consecutively. The conviction and sentence on Ram Prasad under section 328 will also remain in full force, and his appeal against his conviction under this section is dismissed. The rule issued to the two appellants is discharged.